88-1274

No. _____

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

ROLF LARSEN,

Petitioner,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., and ROBERT SURRICK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Questions Presented

The Pennsylvania Superior Court determined that the Petitioner, a Justice of the Pennsylvania Supreme Court, does not have a private cause of action for civil damages against the Respondents for their violations of the provisions contained in the Constitution, Statutes and Supreme Court Rules for the Commonwealth of Pennsylvania which mandate the confidentiality of proceedings before the Pennsylvania Judicial Inquiry and Review Board.

The questions presented are:

(1) Whether the Respondents' First Amendment right of freedom of the press will be violated if Petitioner is allowed a private cause of action for civil damages for their violation of the confidentiality mandates; and,

(2) Whether the lower court was correct in relying upon this Court's holding in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978) as precedent for its decision since the *Landmark* Court explicitly reserved the issues raised in this case for a later decision.

List of Parties

The parties to the proceedings below were Petitioner, Rolf Larsen; and Respondents, Philadelphia Newspapers, Inc.; Knight-Ridder Newspapers, Inc.; PG Publishing Co.; William Block; Paul Block, Jr.; Daniel R. Biddle; Edwin Guthman; Sam S. McKeel; Fritz Huysman; Eileen Foley; John G. Craig, Jr.; and, Robert Surrick.

The parties before this Court are the same as those below.

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IN THE

Supreme Court of the United States

October Term, 1988

No. _____

ROLF LARSEN,

Petitioner,

vs.

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

The Petitioner, Rolf Larsen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Superior Court entered in the above entitled proceeding on June 2, 1988.

Opinions Below

The Order of the Pennsylvania Supreme Court dated October 31, 1988 is reprinted in the appendix hereto, p. 1a, *infra*.

The Order of the Pennsylvania Superior Court dated June 2, 1988 is reprinted in the appendix hereto, p. 3a, *infra*, along with the Opinion.

Also included in the Appendix is the Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania entered May 16, 1984, at p. 30a, *infra*, and the Order of Court entered June 20, 1984, at p. 75a, *infra*.

Jurisdiction

Pursuant to 42 Pa. C.S.A. §702(b), Pa.R.A.P. 312 and Pa.R.A.P. 1311, Petitioner filed with the Pennsylvania Superior Court a Petition for Permission to Appeal the decision of the Court of Common Pleas of Allegheny County, Pennsylvania which was granted by Order of Court dated April 4, 1985 and amended on April 9, 1985 thereby invoking the jurisdiction of the Pennsylvania Superior Court.

On July 5, 1988, Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court in accordance with Rule 1112(b) of the Pennsylvania Rules of Appellate Procedure. Said Petition was denied on October 31, 1988.

The jurisdiction of this Court to review the Orders and Opinion of the Pennsylvania Superior and Supreme Courts is invoked under 28 U.S.C. §1257(3).

Statutes Involved

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the Commonwealth of Pennsylvania, Article V, §18(h)—Suspension, removal, discipline and compulsory retirement

> (h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section sixteen of this article. Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

42 Pa. C.S.A. §3332—Investigation and hearing

> (a) Investigation.—The Judicial Inquiry and Review Board shall keep informed as to the matters relating to the grounds for suspension, removal, discipline, or compulsory retirement of judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it seems necessary.

(b) Hearing.—The board, after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a judge. The orders of the board for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(c) Privilege.—The filing of papers with and the giving of testimony before the board shall be privileged.

42 Pa. C.S.A. §3334—Proceedings confidential

All papers filed with and proceedings before the Judicial Inquiry and Review Board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character.

Supreme Court Rule 20 of the Rules Governing the Procedure of the Judicial Inquiry Review Board

All papers filed with and proceedings before the Board shall be confidential until a record is filed by the Board in the Supreme Court.

Statement of the Case

On December 5, 1980, the Pennsylvania Judicial Inquiry and Review Board ("JIRB") undertook an investigation of the Petitioner, The Honorable Rolf Larsen, a Justice of the Pennsylvania Supreme Court, for various alleged improprieties. By the terms of 42 Pa. C.S.A. §3332, the JIRB is empowered to investigate charges "relating to grounds for suspension, removal, discipline or compulsory retirement of judges." 42 Pa. C.S.A. §3332(a). If the JIRB finds the charges to be well-founded and sufficient to constitute the basis for suspension, removal, discipline or compulsory retirement, it is to make such recommendations to the Pennsylvania Supreme Court and, at that time, to file the record with the Supreme Court; otherwise, the record remains with JIRB and remains confidential. *First Amendment Coalition v. Judicial Inquiry and Review Board*, 501 Pa. 128, 460 A.2d 722 (1983).

In the instant action, formal hearings which were to be confidential were commenced by JIRB on June 1, 1982. On May 5, 1983, at the conclusion of the hearings, the JIRB voted to dismiss the charges against Petitioner. Accordingly, the proceedings before JIRB were mandated to remain confidential pursuant to Article V, Section 18(h) of the Pennsylvania Constitution, 42 Pa. C.S.A. §3334, and Supreme Court Rule 20 of the Rules of Procedure Governing the Judicial Inquiry and Review Board.

Beginning June 2, 1982, the Respondents published numerous newspaper articles in the Philadelphia Inquirer and the Pittsburgh Post-Gazette containing excerpts of the purported confidential transcripts of the JIRB hearings, and revealing other confidential information regarding the hearings.

Following these publications, Petitioner filed a Complaint in Equity alleging that the Respondents obtained these transcripts in an illegal manner and published only selected excerpts of the transcripts which, read out of context, placed Petitioner in a false light. *See* p. 76a, *infra*. As such, Petitioner asserted claims of malicious defamation, invasion of privacy, violation of the confidentiality provisions contained in the Pennsylvania Constitution, statutes and Supreme Court rules, and publications improperly tending to bias the minds of the public and tribunals. Specifically at issue in this Petition is Count IV of the Amended Complaint which alleges intrusion upon Petitioner's right of privacy by the violation of 42 Pa. C.S.A. §3334, p. 105a, *infra*, and Count VI which alleges a violation of Article V, Section 18(h) of the Pennsylvania Constitution, Supreme Court Rule 20 of the Rules of Procedure Governing the Judicial Inquiry Review Board and 42 Pa. C.S.A. §3334. *See* p. 109a, *infra*. In both Counts IV and VI, Petitioner seeks money damages for Respondents' violation of these confidentiality provisions.

On December 5, 1983, the Respondents filed Preliminary Objections in the nature of a demurrer to the Complaint in Equity in accordance with Rules 1017(b) and 1028 of the Pennsylvania Rules of Civil Procedure and, as a result, Petitioner filed an Amended Complaint. Subsequently, the Respondents filed Preliminary Objections in the nature of a demurrer to the Amended Complaint.

On May 16, 1984, the Court of Common Pleas of Allegheny County, Pennsylvania issued an Opinion and Order in which it, *inter alia*, sustained the Respondents' preliminary objections in the nature of a demurrer as to Count IV with leave to amend the claim under Section 652B of the Restatement (Second) of Torts for intrusion upon seclusion and to Count VI of the Amended

Complaint on the basis that the Petitioner could not assert a private cause of action for civil damages under Article V §18(h) of the Pennsylvania Constitution, 42 Pa. C.S.A. §3334 or Supreme Court Rule 20 of the Rules of Procedure Governing the Judicial Inquiry Review Board, and in support thereof, cited *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978).

On June 20, 1984, the lower court issued a second order amending the May 16, 1984 Order in which the court stated that "an immediate appeal ... may materially advance the ultimate termination of [this] matter." As a result, the Petitioner filed a Petition for Permission to Appeal with the Superior Court of Pennsylvania which was granted on April 4, 1985. Following the numerous briefs and reply briefs and two (2) oral arguments, the Superior Court of Pennsylvania issued its Opinion and Order on June 2, 1988 in which it affirmed, *inter alia*, the lower court's order dismissing Count VI and sustaining the demurrer as to Count IV with leave to amend the claim for intrusion upon seclusion, and in support thereof, relied upon *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978).

On July 5, 1988, Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on the basis that the Superior Court erred in holding that the confidentiality provisions contained in the Pennsylvania Constitution, statute and Supreme Court Rule did not create a private cause of action for invasion of privacy. On October 31, 1988, the Supreme Court issued a one page Order denying the Petition for Allowance of Appeal. In accordance with 28 U.S.C. §1257(3), Respondent now seeks a writ of certiorari from this Court as to the question of whether a private cause of action may be given to a person for violations by the media of the JIRB confidentiality provisions.

Reason for Granting the Writ

I.

This case presents for resolution the issues which this Court explicitly reserved for future decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978). As such, the Pennsylvania Superior Court misinterpreted and erroneously applied this Court's holding in *Landmark* in concluding that the Respondents' First Amendment right to freedom of the press would be harmed if Petitioner were given a private civil cause of action for Respondents' violations of the confidentiality provisions mandated by the Pennsylvania Constitution, statutes and Supreme Court Rules.

In Counts IV and VI of the Amended Complaint, Petitioner asserts, *inter alia*, that the Respondents' publication and republication of the purported JIRB transcripts and other hearing information violated the law regarding confidentiality of such proceedings which are mandated by Article V, Section 18(h) of the Pennsylvania Constitution, 42 Pa. C.S.A. §3334, and Supreme Court Rule 20 of the Rules of Procedure Governing the Judicial Inquiry Review Board and as a result of said publications a cause of action for civil damages arose in Petitioner.

The lower court sustained Respondents' preliminary objections in the nature of a demurrer as to Count IV (with leave to amend the claim for intrusion upon seclusion) and Count VI on the basis that the Petitioner did not have a cause of action against the Respondents for their alleged violations of the confidentiality provisions.

In affirming the lower court, the Pennsylvania Superior Court adopted the Respondents' argument that allowing Petitioner a cause of action for alleged

violations of the confidentiality provisions would violate their First Amendment rights under the United States Constitution. Before reaching this ultimate conclusion, the Superior Court made the preliminary finding that the Respondents had a constitutionally guaranteed right to publish the information obtained from the JIRB proceedings. As such, absent a finding of "actual malice" in the publication, the Respondents would be immune from liability under the confidentiality provisions. *See* p. 10a, *infra*. As support for its preliminary finding and ultimate conclusion, the Superior Court relied upon the holding in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978), and concluded that giving Petitioner a private cause of action would run afoul of the *Landmark* case. *See* p. 14a, *infra*. It is the position of Petitioner that the Pennsylvania Superior Court incorrectly relied upon the *Landmark* decision as support for its affirmation of the lower court and misinterpreted this Court's decision. Petitioner further argues that the important First Amendment issues raised in this case have not yet been specifically addressed or decided by this Court and, in fact, were explicitly reserved for a future decision. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840, 98 S.Ct. 1535, 1542, 56 L.Ed. 2d 1, 11 (1978), *citing Cox Broadcasting Company v. Cohn*, 420 U.S. 469, 497, n.27, 95 S.Ct. 1029, 1047, n.27, 43 L.Ed. 2d 328, 350, n.27 (1975). As such, Petitioner respectfully requests that this Court grant his petition so as to decide these constitutional issues.

The Court in *Landmark* specifically noted the limited issue which was before it. The Court stated that

> the narrow and limited question presented [in the *Landmark* case], . . ., is whether the First Amendment permits *criminal punishment* of *third*

> *persons who are strangers to the inquiry,* including the news media, for divulging or publishing *truthful* information regarding confidential proceedings of the Judicial Inquiry and Review Commission. (Emphasis supplied.)

Landmark, supra, 435 U.S. at 837, 98 S.Ct. at 1540, 56 L.Ed. 2d at 9. In fact, as previously noted, Chief Justice Burger, in writing the opinion of the Court, stated that

> [t]he broader question—whether the publication of truthful information withheld by law from the public domain is similarly privileged—was not reached and indeed was explicitly reserved in *Cox. Id.,* at 497, n.27, 95 S.Ct. at 1047, n.27. We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment.

Id., 435 U.S. at 840, 98 S.Ct. at 1542, 56 L.Ed. at 11. Thus, this Court specifically chose not to consider all of the First Amendment implications regarding the publication of confidential material and expressly reserved such decisions for future cases containing appropriate facts and circumstances.

A review of Petitioner's Amended Complaint reveals that the facts alleged in the instant action differ significantly from the facts in the *Landmark* case. Indeed, the facts asserted by Petitioner give rise to the issues which this Court explicitly reserved for a future decision.

In the instant action, Petitioner alleges in his Amended Complaint that the Respondents obtained the confidential JIRB transcripts by illegal means (not legal means as was the case in *Landmark*) and then printed only selected excerpts from the purported transcripts which resulted in an untruthful portrayal of Petitioner

and the JIRB proceedings.[1] *See* p. 106a, *infra.* (In *Landmark,* the publication at issue was truthful.) Petitioner further asserts that one of the Respondents, Robert Surrick, was a member of JIRB during the proceedings involving Petitioner and that two other Respondents, Fritz Huysman and Daniel Biddle, were witnesses in the proceedings. *See* pp. 81a-82a, *infra.* Unlike the facts in *Landmark* and the issue addressed by that Court, some of the Respondents in the instant case are not "third persons who are strangers to the inquiry". Instead, the Amended Complaint filed by Petitioner pleads that the materials were obtained illegally by the Respondents, some of whom were participants in the JIRB proceedings acting in concert with each other. *See* p. 106a, *infra.* Finally, the issue before the Court in *Landmark* concerned the imposition of criminal sanctions, whereas the instant case involves civil damages. This distinguishing fact is critical to the issue since the imposition of criminal sanctions (which may include prison sentences) is far more onerous than civil penalties. In addition, some types of criminal actions are handled in summary proceedings whereas the types of causes of action alleged in this case give the individual a right to a jury trial.

Thus, it is apparent from a careful review of *Landmark* that this Court reserved certain specific questions regarding the implication of First Amendment rights in cases involving the publication of confidential materials. These issues are paramount to Petitioner's case and, accordingly, the Superior Court's reliance on *Landmark*

[1] The *Landmark* Court specifically noted that it was not concerned "with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Id.,* 435 U.S. at 837, 98 S.Ct. at 1540, 56 L.Ed. 2d at 9.

as sole support for its conclusion is misplaced. As a result of the misapplication of the *Landmark* decision, Petitioner is unable to seek damages for the Respondents' violations of the confidentiality mandates set forth in the Pennsylvania Constitution, statutes and Supreme Court Rules.

The important First Amendment issues which were reserved by this Court in previous cases are now before this Court in the facts contained in the instant action. These issues have a far reaching impact on the rights of individuals *vis-a-vis* the First Amendment rights of the media. Petitioner respectfully requests that this Court grant his petition for a writ of certiorari so that these issues which are paramount to his case and which were explicitly reserved by this Court in prior decisions may finally be decided.

Conclusion

The question raised in this Petition for a Writ of Certiorari involves the misapplication of one of this Court's opinions. Further, this case contains facts which give rise to issues specifically reserved by this Court for a future decision. The First Amendment issues raised in this Petition could have a wide impact in light of the media's quest to publish information, especially if such information is designated as confidential. Accordingly, Petitioner respectfully submits that this case is worthy of this Court's review.

Respectfully submitted,

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APPENDIX A

Order of the Pennsylvania Supreme Court Dated October 31, 1988.

(Stamp)

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

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November 1, 1988

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In Re: Rolf Larsen v. Philadelphia Newspapers, Inc., et al.
Petition of: Philadelphia Newspapers, Inc., et al.
No. 371 W.D. Allocatur Docket 1988
Rolf Larsen, Petitioner v. Phila. Newspapers, Inc., et al.
No. 372 W.D. Allocatur Docket 1988

Gentlemen and Ms. Olson:

The Court has entered the following Order on your Petition for Allowance of Appeal and Cross-Petition for Allowance of Appeal in the above-captioned matters:

"Denied
10/31/88
Per Curiam

Messrs. Justice Larsen and McDermott did not participate in the consideration or decision of this matter."

Very truly yours,

IRMA T. GARDNER
Irma T. Gardner
Deputy Prothonotary

ITG/dad
cc: Frederick N. Egler, Esq.
Robert Surrick, Esq.
Walter T. McGough, Esq.
W. Thomas McGough, Jr., Esq.

Honorable Alfred T. Williams, Jr.
(Hon. Ralph J. Cappy)

APPENDIX B
Opinion and Order of the Pennsylvania Superior Court Dated June 2, 1988.

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

No. 430 Pittsburgh, 1985

ROLF LARSEN,

Appellant,

v.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR. AND ROBERT SURRICK.

ORDER

AND NOW, this 2nd day of JUNE, 1988, it is ordered as follows:

X	Order affirmed in part and reverse in part.
_____	Order reversed.
_____	Judgment affirmed.
_____	Judgment of Sentence affirmed.
_____	Judgment of Sentence reversed.
_____	Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

ELEANOR R. VALECKO
Deputy Prothonotary

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 00430 Pittsburgh 1985

ROLF LARSEN,

Appellant,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. MCKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., and ROBERT SURRICK.

Appeal from the Order of the Court of Common Pleas, Civil Division, of Allegheny County at No. GD 83-19240.

BEFORE: CIRILLO, P.J., CAVANAUGH, BROSKY, ROWLEY, OLSZEWSKI, DEL SOLE, KELLY, POPOVICH and JOHNSON, JJ.

OPINION BY POPOVICH, J.: FILED: JUNE 2, 1988

This is an appeal from an interlocutory order granted by permission of the Superior Court to the appellant, Rolf Larsen. See Pa.R.App.P. 312; 42 Pa.C.S. §702(b).

Because the appellant challenges the grant of the appellees'[1] preliminary objections in the nature of a demurrer to his amended complaint, we must accept as true all well-pleaded facts in his amended complaint and the reasonable inferences to be drawn therefrom. *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). Further, a demurrer can only be sustained if it is certain that no recovery is permitted. Any doubt must be resolved against sustaining the demurrer. *Clevenstein v. Rizzuto*, 439 Pa. 397, 266 A.2d 623 (1970). In accordance with those standards, the factual allegations in the amended complaint must be examined to determine whether reasonable men might infer a libelling of the appellant and/or an invasion of his privacy by the appellees has transpired.

On December 5, 1980, as a result of various articles appearing in *The Philadelphia Inquirer*[2] and *The Pittsburgh Post-Gazette*,[2] in which the appellant claims he was portrayed as being involved in "political activity, racism, favoritism, and influence peddling", the then Chief Justice of our Supreme Court, Henry X. O'Brien, indicated to the appellees that he was requesting the Judicial Inquiry and Review Board (JIRB) to initiate an investigation of the matters which were published.

On or about June 1, 1982, the JIRB commenced formal hearings concerning the appellant, the conclusion of which occurred on May 5, 1983, and led to an exoneration of the appellant and a JIRB vote, of 5-3, that the entire record of the investigation, including its findings, be sealed forever.

[1] The appellees/defendants consist of Philadelphia Newspapers, Inc., Knight-Ridder Newspapers, Inc., PG Publishing Co., William Block, Paul Block, Jr., Daniel R. Biddle, Edwin Guthman, Sam S. McKeel, Fritz Huysman, Eileen Foley, John G. Craig, Jr. and Robert Surrick.

[2] The appellee Knight-Ridder Newspaper, Inc., a corporation, owns, operates and controls Philadelphia Newspapers, Inc., which, in turn, publishes *The Philadelphia Inquirer*. As for *The Pittsburgh Post-Gazette*, it is owned and published by the appellee/corporation PG Publishing Co.

During the course of the hearings, the appellant charges, the appellees published numerous articles: some allegedly placed him in a false light, others attributed to him the violation of the Code of Judicial Conduct and, lastly, others contained purported confidential information (e.g., testimony given by witnesses) of what transpired during the JIRB inquiry, the latter allegedly in violation of the state constitution (Article V, Section 18 (h)), a statute (42 Pa.C.S. §3334) and the JIRB rules of procedure (Rule 20).

Following these publications, the appellants filed a seven-count, 129-paragraph complaint in equity.

In Count I, the appellant sought a permanent injunction against the appellees from continuing to publish or republish articles libelling the appellant and/or all or portions of the supposedly confidential transcript and record of the JIRB proceedings.

Counts II and III claimed the appellant was defamed by the articles published and asked for damages, as was the case in all subsequent counts, in excess of $20,000 for the injuries incurred; Count IV's cause of action was rooted in Restatement (Second) of Torts §652B, 42 Pa.C.S. §3334, the state constitution (Article I, Section 18(h)) and JIRB's Rule 20, i.e., intrusion of the right of privacy; Count V's contention was premised on Restatement (Second) of Torts §652E, i.e., invasion of privacy: false light, by the appellees' purported selective publication of confidential excerpts from the JIRB proceedings; Count VI's request for relief was grounded upon the appellees' failure to respect the inherent right of the appellant to his reputation, as allegedly protected by Article I, Section 1, Article V, Section 18(h) of the state constitution, and 42 Pa.C.S. §§3334, 8341 et seq.;

and Count VII rested upon a right of action purportedly existing in 42 Pa.C.S. §4135 for the claimed defamatory publications by the appellees.

Preliminary objections in the nature of a demurrer followed and culminated in the submission of an amended complaint, which was similar in substance to the original one presented, by the appellant. What followed was an order of court, accompanied by a 49-page opinion, which, as is herein germane to the matter on appeal, (1) sustained the demurrer to Count IV, but granted leave to file a second amended complaint to the appellant to substantiate his cause of action under Section 652B of the Restatement (Second) of Torts, (2) sustained the demurrer to Count V and granted leave to the appellant to amend to plead facts giving rise to a cause of action under Section 652E of the Restatement (Second) of Torts, (3) sustained the demurrer to Count VI and (4) sustained the demurrer to Count VII.

Thereafter, the order entered was amended to read that the paragraphs recited above involved controlling questions of law as to which there was substantial ground for a difference of opinion and that an immediate appeal from the original order might materially advance the ultimate determination of the matter. This Court, upon petition of the appellant, granted permission to appeal the interlocutory order at issue. With the submission of briefs by all concerned and the presentment of oral argument before this Court sitting en banc, the matter is now ripe for resolution.

The first issue to be addressed is whether the court below erred in sustaining the demurrer to Counts IV and VI of the amended complaint on the basis that the appellant did not have a cause of action against the appellees for their purported violation of the

confidentiality mandated in Article V, Section 18(h) of the Pennsylvania Constitution, 42 Pa.C.S. §3334 and Rule 20 of the Supreme Court Rules governing JIRB proceedings.[3]

It is the appellant's position that without engrafting a private cause of action entitling one to the recoupment of damages for violation of the confidentiality provisions of the Pennsylvania Constitution, statute and JIRB rule governing judicial inquiries, "the confidentiality provisions lose all meaning and their purpose cannot be effectuated." This is so, argues the appellant, since the various provisos requiring confidentiality make no reference as to how a violation of the confidentiality is to be treated or whether any type of sanction was ever contemplated by the drafters of the respective regulations.

In response, the appellees contend that the violation of the confidentiality provisions cannot give rise to a private cause of action for a breach thereof. If this were to occur, they urge, such an interpretation would violate their First Amendment rights under the United States Constitution and under Article I, Section 7 (Freedom of the press) of the Pennsylvania Constitution.

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[3] Article V, Section 18(h) of the Pennsylvania Constitution reads:

> Suspension, Removal, Discipline and Compulsory Retirement
> Section 18.
>
> * * * *
>
> (h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under

(Footnote continued on following page.)

Preliminarily, prior to reaching the question of whether a *private* cause of action exists so as to afford the appellant the right to sue the appellees for damages, via the Pennsylvania Constitution, statute and rule proffered for alleged damages arising out of the publication of what took place at the JIRB proceedings, we find it prudent to address the question of whether the appellees had a right to publish the information generated during the JIRB hearings. For if, as we see it, the appellees had a constitutionally-based right to print the information secured by them, (the methodology by which this occurred is not discernible from the pleadings before us) then, absent "actual malice" in the publication, the appellees would be immune from liability, at least to the

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(Footnote continued from preceding page.)

> section sixteen of this article. Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

42 Pa.C.S. §3334 provides:

> All papers filed with and proceedings before the Judicial Inquiry and Review Board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character.
> 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978.

Rule 20 of the Judicial Inquiry and Review Board reads:

> All papers filed with and proceedings before the Board shall be confidential until a record is filed by the Board in the Supreme Court.

extent that recovery would be premised upon the specific provisions of the Pennsylvania Constitution, statute and rule argued by the appellant.[4]

We begin our discussion with *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), in which the United States Supreme Court was faced with the issue of whether the Commonwealth of Virginia could subject individuals, including newspapers, to "criminal" sanctions for disclosing information presented before a state judicial review commission authorized to hear complaints as to judges' misconduct, given that such proceedings were declared to be "confidential" by the State Constitution (Article 6, §10), statute (§2.1-37.13) and rule of the commission (No. 10).

It appears that a Virginia newspaper printed an accurate article on a pending inquiry by that State's Judicial Inquiry and Review Commission (JIRC) investigating a judge's conduct. Thereafter, the newspaper was indicted for divulging the information submitted to the JIRC as violative of the State's statute which implemented the constitutional mandate of confidentiality. The two were consistent with the JIRC's Rule No. 10 on confidentiality, save for the Rule's imposition of a misdemeanor status for its violation.

The managing editor, albeit cognizant of the possible criminal repercussions, decided to publish the article in the belief that the matter was of public importance and should be brought to the readers' attention. Also, the editor testified that no member of his staff was summoned before the JIRC to give testimony in connection with what appeared in the article.

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[4] Parenthetically, the appellees (as non-participants in the JIRB proceedings) allegedly did no more than report (in a substantively correct manner) what took place before a board of record. See generally *Sprague v. Walter*, 357 Pa.Super. 570, 516 A.2d 706 (1986).

After trial, in which the newspaper was found guilty and ordered to pay a $500 fine, the Supreme Court of Virginia upheld the conviction on appeal. It did so in the belief that:

> ... absent a requirement of confidentiality, the [JIRC] could not function properly or discharge effectively its intended purpose.[5] Thus, sanctions [we]re indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice.

217 Va. 699, 712, 233 S.E.2d 120, 129.

On certiorari to the United States Supreme Court, the decision was reversed and review was restricted to the narrow issue of whether the First Amendment condones criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the JIRC.[6]

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[5] These purposes were defined as: (a) protection of a judge's reputation from the adverse publicity which might flow from frivolous complaints, (b) maintenance of confidence in the judicial system by preventing the premature disclosure of a complaint before the JIRC had determined that the charge was well founded, and (c) protection of complainants and witnesses from possible recrimination by prohibiting disclosure until the validity of the complaint had been ascertained.

[6] At bar, our reading of the pleadings does not indicate the source of the appellees' information/transcripts regarding the JIRB proceedings. Thus, it is not presumptious for us to equate third-party/non-participatory status with the appellees, as occurred in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978).

In making its determination, the United States Supreme Court concluded that:

> . . . the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom.

435 U.S. at 838, 98 S.Ct. at 1541 (Citation omitted). Elaborating further, the Court engaged in a discussion recounting the traditional belief that the law affords " '[j]udges as persons . . . no greater immunity from criticism than other persons or institutions.' " Id. at 839, 98 S.Ct. at 1541, quoting *Bridges v. California*, 314 U.S. 252, 289, 62 S.Ct. 190, 206, 86 L.Ed. 192 (1941). This precept is embedded in the understanding that the judicial conduct of judges is a matter of the "utmost public concern." And, to effectuate this belief, the press is " 'regarded as the handmaiden of effective judicial administration . . .. [and] guards against the miscarriage of justice by subjecting the . . . judicial process to extensive public scrutiny and criticism.' " Id., quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600 (1966).

The fact that the JIRC was under examination entitled it to no less exposure than the operation of the judicial system itself. Both were held to be a "matter of public interest, necessarily engaging the attention of the news media." Id. at 839, 98 S.Ct. at 1542. As such, the publication by the newspaper satisfied those concerns of informing the public and prompting discussion of governmental affairs which the First Amendment was

written to protect. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964).

The assertion of the attorneys for the Commonwealth of Virginia that criminal sanctions were necessary to ensure the guarantee of confidentiality and that anything less would render such secrecy no more than an empty promise was likewise rejected by the Court as being buttressed by little more than assertion and conjecture.

To the same extent, we find that the appellant's contention that a refusal by this Court to acknowledge and legitimize a private cause of action for violation of the particular provisions of the Pennsylvania Constitution, statute and rule cited earlier would render the "confidentiality" aspect of each nugatory is no more persuasive.

The incantations of the appellant as to the protections sought to be afforded those subject to the scrutiny of the JIRB, being, essentially, similar to those voiced to the United States Supreme Court (see note 5, supra) as warranting the enforcement of a violation of Virginia's "confidentiality" provision, cannot be endorsed without running afoul of *Landmark*. The Supreme Court's profound concern with having the First Amendment's freedom of the press to scrutinize and discuss governmental, as well as judicial, matters is pristinely clear and takes precedence over the breach of a "confidentiality" proviso associated with a judicial inquiry board's function and operation.

As to one's recourse for a breach of such a "confidentiality" proviso, it was noted in passing that the use, by the more than 40 other States having similar commissions, of contempt charges was deemed an appropriate tool to giving effect to the confidentiality

provisions associated with such inquiry boards. See *Landmark*, supra, 435 U.S. at 841 n. 12, 98 S.Ct. at 1542-43 n. 12.

What is to be gleaned from the *Landmark* case is that neither the protection of a judge's reputation nor the preservation of the integrity of the courts is sufficient to condone the *subsequent punishment of the press* when it comes to recounting what transpired before a judicial inquiry and review board, even assuming that, for example, criminal sanctions do in fact enhance the guarantee of confidentiality.

The *Landmark* Court conceded that some risk of injury to a judge under inquiry may be posed by premature disclosure. Nonetheless, before *punishment* can be imposed for utterances made with regard to proceedings held before a judicial inquiry and review board, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished . . .." *Bridges v. California*, supra, at 263, 62 S.Ct. at 194. In the view of the Court in *Landmark*, the confidentiality claim and its effectuation fell short of such a requirement.

We find *Landmark* to be controlling here.

Instantly, as in *Landmark*, premature disclosure of information before an inquiry board hearing testimony regarding a judge's alleged misconduct was published by a newspaper. Similarly, as in Pennsylvania, the Virginia inquiry board drew its authoritative "confidentiality" requirement from the State's Constitution, statute and rule, all of which are similar in substance to those in Pennsylvania and presented by the appellant as grounds for invocation of a private right of action for the violation of the same.

The only difference between the two sets of provisions, of any material worth, appears to be that the Virginia version imposes criminal sanctions whereas Pennsylvania's does not.

Notwithstanding the variance in the sanctions to be imposed by both sets of provisions to enforce a violation of the "confidentiality" aspect of the inquiry boards' proceedings, we find that the imposition of monetary damages (civil sanction) can be just as inimical to and an encroachment of one's First Amendment guarantees as criminal sanctions. Cf. *Alim v. Superior Court (Atlee),* 185 Cal.App.3d 144, 229 Cal.Rptr. 599, 605 (1986) ("If the need for publication of information about public officials warrants a privilege against criminal sanctions it must also warrant a privilege against civil sanctions." (Citations omitted)).

Additionally, we note that if the Legislature had intended to permit the recoupment of damages for violation of 42 Pa.C.S. §3334, it could have very easily expressed such an intention, as is the case in 42 Pa.C.S. §8351(a), which explicitly addresses the subject of liability for wrongfully instituting or pursuing civil proceedings. See *Lindsay v. Thomas,* 77 Pa.Cmwlth. 171, 174, 465 A.2d 122, 123 (1983).

Consistent with the aforesaid is the decision of the Third Circuit Court of Appeals in *The First Amendment Coalition v. Judicial Inquiry and Review Board,* 784 F.2d 467 (1986), wherein it was observed that nothing in Pennsylvania's Constitution bars the dissemination of information which the press *has received.*

Thus, nothing in the text of the provisions relied upon by the appellant or the case law reviewed suggests that this Court should create a civil remedy not otherwise expressly mentioned in the relevant provisions, and we

have been presented with no persuasive argument to the contrary. Accordingly, the appellant's request that we endorse a private cause of action for a violation of the respective provisions of the Pennsylvania Constitution, statute and rule, mentioned previously, will not be entertained on the authority proffered to us at this time.

We now turn to the appellant's second contention on appeal. It alleges the commission of error by the court below in sustaining the demurrer to Count IV since the amended complaint did state a cause of action for invasion of privacy under §652B of the Restatement (Second) of Torts.

Section 652B provides for a cause of action against one who intrudes upon the privacy of another; to-wit:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.

Violation of Section 652B is an actionable tort in Pennsylvania. *Marks v. Bell Telephone Co. of Pa.*, 460 Pa. 73, 331 A.2d 424 (1975).

In its opinion, the court below concluded that the appellant had satisfied two of the three prongs necessary to make out a cause of action under Section 652B, i.e., the appellees (1) intentionally intruded upon (2) the private affairs of the appellant by publication of "any" portion of the JIRB proceedings prior to that point in time when they would become a matter of public record with their submission to the Supreme Court of Pennsylvania for consideration of disciplinary action against the party being investigated. We only find fault

with the conclusion that "any" portion of the JIRB proceedings being published prior to a set point in time would be actionable. See note 7, infra.

Recently, a California appeals court interpreted various United States Supreme Court rulings, which included *Landmark,* on the subject of the liability aspect of the news media in disclosing confidential information gathered by a review board assessing the qualifications of a candidate for judicial office. In doing so, the court concluded that the news media should be insulated from civil liability in publishing information protected by a state's laws from disclosure, with the caveat that the methods implemented to secure the data had to be consistent with "routine reporting techniques." *Nicholson v. McClatchy Newspapers,* 223 Cal.Rptr. 58, 64 (1986). In particular, the *Nicholson* court wrote:

> While the government may desire to keep some proceedings confidential and may impose a duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques. (See *Landmark Communications, Inc. v. Virginia,* supra, 435 U.S. at pp. 837-838, 98 S.Ct. at 1340-41, 56 L.Ed.2d at p. 9.)

223 Cal.Rptr. at 64.

From our reading of the pleadings peculiar to Count IV, the appellant charges the appellees, in paragraph 115, with acting "in concert with one another to *illegally* procure, publish, republish or cause to be published the purported confidential transcript" from the JIRB proceedings. This attribution of "illegality" would appear to negate, at least at first blush, the use of proper methodology in the gathering of information which

would render immune from suit the news media. This is in accord with the precept that a "publisher of a newspaper has no special immunity from the application of general laws[, since h]e has no special privilege to invade the rights and liabilities of others." *The Associated Press v. Nat. Lab. Rel. Bd.*, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). Stated differently, "[c]rimes and torts committed in news gathering are not protected[, and this] is no threat to a free press in requiring its agents to act within the law." *Galella v. Onassis*, 487 F.2d 986, 995-996 (2d Cir. 1973). Accord *Landmark*, supra; *Nicholson*, supra, 223 Cal.Rptr. at 63.

However, our dilemma is that we are unable to ascertain the thrust of the appellant's "illegality" argument, i.e., we know not whether it relates to a purported violation of the Pennsylvania Constitution, statute and rule of confidentiality covering JIRB proceedings (which, this day, we have found to be wanting), or whether it encompasses the use of subterfuge in obtaining the information published which goes beyond the acceptable bounds of news gathering techniques and exposes news media defendants to liability for torts committed in pursuit of information. See *Nicholson*, supra.

Accordingly, we find that the court below did not err in sustaining the appellees' preliminary objection in the nature of a demurrer as to Count IV as written and affording the appellant the opportunity to amend, for a second time, his contention surrounding his Section 652B claim. (See Order of Court dated May 16, 1984, paragraph 2) In particular, he will be required to elaborate on the "illegality" assertion to hurdle the legitimate methods open to the press to obtain

information and avoid civil liability for what it prints.[7] See *Landmark*, supra; *Nicholson*, supra. Consequently, if the appellant drafts his amended complaint to aver the appellees' engagement in illegal conduct in the securement of the JIRB transcripts, one cannot arguably deny that a "reasonable" person would be offended by such a course of conduct aimed at exposing personal information to the public. See *Alim*, supra.

The third protestation by the appellant centers upon alleged court error in sustaining the appellees' preliminary objections as to Count V (Invasion of Right of Privacy: False Light under Restatement (Second) of Torts §652E).

Our review of the first paragraph in Count V indicates that incorporated therein by the appellant is a majority of the preceding 115 paragraphs of the amended complaint. As such, we conclude that a "false light" claim under Section 652E has been made out as to all of the articles assailed by the appellant as being actionable as a tort. In support of such a finding, we will discuss a portion of the pleadings which we believe is reflective of the particularity with which Count V was drafted so as to hurdle the appellees' preliminary objections in the nature of a demurrer. However, before engaging in such a discussion, we deem it advisable to set forth the status of a "false light" cause of action in this jurisdiction.

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[7] We caution that, in drafting the amended complaint, the appellant must realize the impact of the recent Third Circuit decision condoning the restriction on the divulging of information heard before the JIRB, but not to the extent that a witness testifying before the JIRB is precluded from speaking to the press about what he testified to at the proceedings. See *The First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3rd Cir. 1986). This, the Third Circuit concluded, would be violative of the First Amendment freedom of speech, and, therefore, was accessible to the news media through its legitimate news-gathering tactics and a proper subject of publication.

It is beyond peradventure that the tort of invasion of privacy does exist in this Commonwealth. See *Vogel v. W.T. Grant Co.*, 458 Pa. 124, 327 A.2d 133 (1974). Even though the contours of this tort remain amorphous, see *Marks v. Bell Telephone Co. of Pa.*, supra, Superior Court has adopted the definition of the tort of invasion of privacy promulgated by the Restatement (Second) of Torts §§652B-E. See *Chicarella v. Passant*, 343 Pa.Super. 330, 494 A.2d 1109 (1985) (reargument denied). Moreover, it has been observed that the cause of action for invasion of privacy is actually comprised of four analytically distinct torts: 1) intrusion upon seclusion, 2) appropriation of name or likeness, 3) publicity given to private life, and 4) publicity placing a person in false light. *Marks v. Bell Telephone Co. of Pa.*, supra.

Instantly, the appellant contends that his privacy was invaded by the appellees' publication of articles which placed him in a false light. Under Section 652E of the Restatement (Second) of Torts, the tort is defined as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

As is so clearly stated in Section 652E, a publication is actionable if it is not true, is highly offensive to a reasonable person and is publicized with knowledge or in

reckless disregard of its falsity. See Comments *a*, *c* & *d*. Further, to constitute a tortious invasion of privacy an act (publication) must " 'cause mental suffering, shame or humiliation to a person of ordinary sensibilities.' " *Hull v. Curtis Publishing Co.*, 182 Pa.Super. 86, 99, 125 A.2d 644, 646 (1956), quoting *Smith v. Doss*, 251 Ala. 250, 252-53, 37 So.2d 118, 120-21 (1948).

Moreover, our review of the writings and case on the subject at hand also gives credence to the tenet that recovery in tort for the disclosure of public, as well as private, facts, even though they be true, is warranted to protect a claimant's right to be free from being placed in a false light and incurring the resultant mental suffering, shame or humiliation which may be caused by the discriminate publication of such facts. See *Prosser, Privacy*, 48 Cal. L.Rev. 383, 416 (1960); *Fogel v. Forbes*, 500 F.Supp. 1081, 1087 (E.D. Pa. 1980); *Hull v. Curtis Publishing Co.*, supra.

Allowing the individual a cause of action in instances like that in the case before us, where the media allegedly selectively excerpts and publishes portions of the truth, finds support in the law of defamation. For example, in *Dunlap v. Philadelphia Newspapers, Inc.*, 302 Pa.Super. 475, 448 A.2d 6 (1982), the Court ruled that a finding of falsity might be drawn from the true, factual statements, if those factual statements implied falsehoods. "Literal accuracy of separate statements will not render a communication 'true' where as here the implication of the communication as a whole was false." *Id.* at 493, 448 A.2d at 15. *Accord McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1981); *Memphis Publishing Co. v. Nicholas*, 569 S.W.2d 412 (Tenn. 1978); *Kapellas v. Kofman*, 1 Cal.3d 20, 459 P.2d 912, 81 Cal.Rptr. 360 (1969).

The falsity with which we are concerned arises from the inference derived from published statements, whether those statements are actually true or not. We find that the element of falsity is met if the plaintiff alleges that the defendant knowingly or recklessly selectively printed or broadcast true statements or pictures in a manner which created a false impression. To permit an editor to publish misleading portions of the truth is the equivalent of sanctioning the promulgation of falsehoods under the guise of the First Amendment. This was never the intention of the drafters of the Constitution nor has the First Amendment been interpreted to insulate one from any and all complaints premised upon the publication of false or misleading information. See *Sprague v. Walter,* 357 Pa.Super. 570, 516 A.2d 706 (1986); *McCormack,* supra. This is evident from the fact that in the print media, "the passages selected for deletion and modification ... can cause a dramatic change in the impression which the final article will generate in the minds of the average reader. And these editing decisions are calculated ones made by the editors to comport with the tone of the magazine desired." *Corabi v. Curtis Publishing Co.,* 441 Pa. 432, 446, 273 A.2d 899, 916 (1971). Accord *Sprague,* supra.

In other words, despite the accuracy of the facts disseminated, discrete presentation of information in a fashion which renders the publication susceptible to inferences casting one in a false light entitles the grievant to recompense for the wrong committed. See *Bell v. Birmingham Publishing Co.,* 266 Ala. ____6, 96 So.2d 263 (1957); *Anderson v. Low Rent Housing Commission,* ____4 N.W.2d 239 (Iowa 1981); *McCormack,* supra.

At bar, the appellant's incorporation of almost all of the previous 115 paragraphs into Count V necessitates that those paragraphs (and the material facts asserted

therein) be viewed as a whole and are to be given every reasonable inference deducible therefrom in assessing the preliminary objections of the appellees in regard thereto. *Sinn v. Burd*, supra. As such, we find that Count V withstands the challenge of the appellees' preliminary objections.

To explain, *The Post-Gazette* articles of November 19, 20 of 1982 & March 9 of 1983 were alleged to have accused the appellant of lying under oath before the JIRB as to his supposed encouragement of Allegheny County District Attorney Robert Colville to run for the Pennsylvania Supreme Court. (Paragraphs 30, 32 & 34)

The appellant asserted that the November 19 and 20 articles were "false" in that he did not deny under oath that he visited the district attorney in 1980. (Paragraphs 35 & 36) Further, according to the appellant, the two articles were printed by *The Post-Gazette* knowing that they were false or in reckless disregard of their truth or falsity. (Paragraph 37)

In addition, as we read on in the complaint, we learn that *The Inquirer* published an article titled: "Now the people will judge", on May 8, 1983, recounting that the appellant had taken part in the Pennsylvania Supreme Court's rejection of a JIRB member's request that the records of the Larsen inquiry be opened to the public or the high Court consider the matter for review. (Paragraph 59) Again, reports in the May 13 & 29, 1983 editions of *The Inquirer* recited essentially the same information. (Paragraphs 61 & 63) Likewise, on June 15 & 18 of 1983, *The Post-Gazette* is charged by the appellant with recapitulating the identical story accusing him of voting in a matter concerning his inquiry. (Paragraphs 65 & 67)

Of interest in our assessment of the propriety of the preliminary objections granted by the court below is the fact that, at paragraph 71, the appellant specifically denied "deliberat[ing] or vot[ing] on a matter involv[ing] himself", as referred to in paragraphs 59, 61, 63, 65 & 67. Nor, the appellant continues to aver in paragraph 71, was the subject of the review before the Supreme Court on a petition to take jurisdiction of the case. Rather, it was merely an application for leave to file a petition.

As for Count V's incorporation of paragraphs 59, 61, 63, 65 & 67, we deem each sufficient to allege a cause of action under Section 652E and to withstand a demurrer. The same can be said with regard to the entire Count V segment of the appellant's complaint. Accordingly, the appellant need not amend Count V. To the extent that the court below so directs, its order is reversed.

The last issue to which we respond is the error allegedly committed by the court below in sustaining the demurrer to Count VII, wherein 42 Pa.C.S. §4135 was stated as the basis for a cause of action against the appellees for the various articles that they published.

Section 4135 reads:

> (a) General rule.—Publication out of court respecting the conduct of judges, district justices, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal shall not be construed as a contempt of court on the part of the author, publisher or other person connected with such publication.
>
> (b) Civil and criminal liability not affected.—If any publication specified in subsection (a) shall improperly tend to bias the minds of the public, or

> of the tribunal, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal, any person aggrieved thereby may proceed against the persons responsible for the publication by appropriate civil action or criminal proceeding.

The Act of July 9, 1976, P.L. 586, No. 142, §2, as amended and renumbered §4135 on December 20, 1982, P.L. 1409, No. 326, art. II, §201, 42 Pa.C.S. §4135 (Supp. 1987).

In paragraph 128, the appellant propounds that:

> The aforementioned publication and republication by [the appellees] has caused extreme and irreparable harm to [the appellant's] interest in (1) having the matters resolved by individuals who have not been exposed to such publications and republications of [the appellees]; (2) having justice administered without any question of bias or suggestion of bias; (3) having justice administered by individuals who are not predisposed; and (4) having the resolution of the matter presented to a public and electorate which has not been exposed to [the appellees'] publications.

Our review of the law interpreting the statute in question reveals the absence of informative material on the subject. Thus, given the void, we will resort to the Statutory Construction Act to aid us in our effort to decipher the intent of the Legislature in enacting Section 4135. To begin with, we look to 1 Pa.C.S. §1921, which provides:

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.

Every statute shall be construed, if possible, to give effect to all its provisions.

(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

The Act of December 6, 1972, P.L. 1339, No. 290, §3. Next, we examine 1 Pa.C.S. §1922, and it reads:

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

The Act of December 6, 1972, P.L. 1339, No. 290, §3.

To start with, a common sense reading of subsection (b) of Section 4135 indicates that its purpose and objective is to be informational. For example, it advises "any person aggrieved" by the out-of-court publication of his or her conduct in connection with any matter pending before any tribunal can seek redress "by appropriate civil or criminal proceeding[s]."

As an adjunct to this observation, we note that the 1982 amendments to Section 4135 removed "or criminal action or proceeding as in other cases of wrongful publication" and substituted the verbiage "action or criminal proceeding". Thus, we interpret the clear intent of the Legislature to be to foreclose any separate cause of action for "wrongful publication" under the guise of Section 4135.

Further, we find that Section 4135, rather than being the engine that provides the force for one's complaint, is merely a directional signal which lights the way for one to pursue once he/she believes that an out-of-court publication respecting conduct being heard before any

tribunal biases him/her in the eyes of the public, the tribunal hearing the matter or other participants involved in the process under review.

It is not as though the appellant were without any recourse in his claimed suit against the appellees; we are merely holding that Section 4135 is not a basis for a separate cause of action independent of the "appropriate" civil or criminal remedies that abound in the civil area of the law, e.g., defamation.

Therefore, we are in agreement with the court below that the demurrer to Count VII is to be sustained without leave to amend since it is obvious to this Court that there is no legal basis for relief under Section 4135.

We, having reviewed the various issues presented for our consideration in this interlocutory appeal granted by permission, now affirm in part and reverse in part the order of the court below.

ROWLEY, J. and DEL SOLE, J. recused themselves and did not participate in the consideration or decision of this appeal.

KELLY, J. Concurs in the result.

APPENDIX C

Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania Dated May 16, 1984.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD 83-19240
Issue Number:
Code: 020

OPINION AND ORDER
ALFRED T. WILLIAMS, JR., JUDGE,
Specially Presiding

ROLF LARSEN,

Plaintiff,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., ROBERT SURRICK,

Defendants.

Counsel of Record for Plaintiff,
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[1] *OPINION OF THE COURT*

For disposition are the preliminary objections of the defendants to plaintiff's Amended Complaint in Equity. In this opinion the defendants Philadelphia Newspapers, Inc., Knight-Ridder Newspapers, Inc., Daniel R. Biddle, Edwin Guthman and Sam S. McKeel are referred to collectively as "PNI". The defendants PG Publishing Company, Fritz Huysman, William Block, Paul Block, Jr., Eileen Foley and John G. Craig, Jr. are referred to as the "PG" defendants.

[2] I. *INTRODUCTION*

On December 5, 1980, the Judicial Inquiry and Review Board ("JIRB") undertook an investigation of plaintiff, The Honorable Rolf Larsen, for various alleged improprieties as an Associate Justice of the Pennsylvania Supreme Court. Formal hearings were commenced by JIRB on June 1, 1982. Pursuant to Article V, Section 18(h) of the Pennsylvania Constitution, 42 Pa. C.S.A. §3334, and the JIRB rules, these proceedings were confidential. Defendants Biddle and Huysman, reporters for The Philadelphia Inquirer ("Inquirer") and The Pittsburgh Post-Gazette ("Post-Gazette"), respectively, were subpoenaed and testified at the hearings before the Board. The defendant Robert Surrick, Esquire, was a member of the JIRB during and after the proceeding involving Justice Larsen.

At the conclusion of the hearings on May 5, 1983, the JIRB voted to dismiss the charges. Thereafter the Inquirer and Post-Gazette published numerous excerpts from the purported transcripts of the hearings concerning plaintiff. All of the articles concerning plaintiff published by defendants PNI and PG from December, 1980 to the date of filing the complaint were filed with the Amended Complaint as Appendix A.

Plaintiff's original Complaint in Equity was filed on November 14, 1983. In response to preliminary objections of all defendants except Surrick, plaintiff filed an Amended Complaint on December 15, 1983. The Amended Complaint (herein referred to as the "complaint" since the two are virtually identical)
[3] contains seven counts. Practically all of the factual averments are set forth in the 103 paragraphs of the first count and then incorporated by paragraph number in the remaining counts. In the first count, which is in equity,

plaintiff requests a permanent injunction against publication by defendants of any material found to be defamatory under Counts II to VII. The latter counts set forth claims in trespass for defamation, invasion of privacy, violation of the right to confidentiality and improper attempts to influence a tribunal's decision in pending matters. Plaintiff requests compensatory and punitive damages under each count.

The defendants have filed similar preliminary objections to the Amended Complaint in the nature of a demurrer and lack of capacity to sue as to Counts I, IV, V, VI and VII, a motion to require a more specific pleading in each count and a motion to strike certain allegations relating to punitive damages.

The case was assigned to the undersigned, specially presiding, on December 23, 1983. The issues have been extensively briefed and oral argument was heard on February 10, 1984.

[4] II. *PRELIMINARY OBJECTIONS—DEMURRER*

The standards applicable to a demurrer are well established. In ruling upon a demurrer, the Court must assume that all factual averments in the complaint, and all reasonable inferences therefrom, are true. *McKinney v. State Farm Mutual Insurance Co.,* 295 Pa. Super. 319, 441 A.2d 1252 (1982). For the demurrer to be sustained, it must clearly appear from these facts and inferences that the law will not permit recovery. *Niebauer v. Center City Solid Waste Authority,* 59 Pa. Commonwealth Ct. 264, 429 A.2d 1210 (1981). Conclusions of law and unjustified inferences are not admitted, *Rose v. Wissinger,* 294 Pa. Super. 265, 439 A.2d 1193 (1982), but any doubt as to whether the demurrer should be

sustained should be resolved in favor of overruling it. *Modesta v. S.E. Pa. Transportation Authority,* 300 Pa. Super. 6, 445 A.2d 1273 (1982).

The case law in Pennsylvania clearly disfavors demurrers and sustains such objections only in cases which are free from doubt. *Duffee v. Judson,* 251 Pa. Super. 406, 380 A.2d 843 (1977). The complaint must be examined to determine whether it sets forth a cause of action which, if proven, would entitle the plaintiff to relief. *Rose v. Wissinger,* supra; *Anderson v. Shaffer,* 39 Pa. Commonwealth Ct. 636, 396 A.2d 91 (1979). Insufficient specificity of pleadings is not adequate ground for demurring to a complaint where sufficient facts are averred so that it cannot be determined that the party has no cause of action. *Huguet v. Foodsales, Inc.,* 3 D. & C. 3d 136 (1977). The dismissal of a
[5] complaint on preliminary objections should occur only in cases which are clear and free from doubt; any reservation relative to the legal possibility of recovery should be resolved by refusing to sustain the demurrer. *Easton Area Joint Sewer Authority v. Bushkill-Lower Lehigh Joint Sewer Authority,* 71 Pa. Commonwealth Ct. 553, 455 A.2d 286 (1983). It is with these standards in mind that we turn to the complaint.

[6] III. *DOES COUNT I STATE A CAUSE OF ACTION IN EQUITY FOR INJUNCTIVE RELIEF?*

Count I of the complaint seeks the issuance of a permanent injunction to prevent defendants from republishing any materials found to be defamatory of plaintiff or an invasion of his right to privacy or other rights under Counts II to VII of the complaint. Thus he alleges that after trial on the other counts he is entitled to injunctive relief because money damages would not be

adequate to deter further publication by the defendants and that he would have to "constantly monitor defendants' publications".

The defendants' demurrer contends that such an injunction would constitute a prior restraint violative of both the United States and Commonwealth Constitutions; that equity lacks power to restrain the publication of defamatory matter; that plaintiff has an adequate remedy at law in the form of money damages; and that in equity the defendants would be deprived of their right to a jury trial.

Plaintiff urges that there is a recognized distinction between prior restraint and post restraint, adopting the rationale in the dissenting opinion of former Chief Justice Eagen in *Wm. Goldman Theatres v. Dana*, 405 Pa. 83, 116, 173 A.2d 59, *cert. denied*, 368 U.S. 897, 7 L.Ed.2d 93, 82 S.Ct. 174 (1961). Thus, he argues that if the defendants are found to have defamed him, an injunction against the republication of the defamatory material would not violate the federal or state Constitutions. For reasons which follow, we do not
[7] believe that the current state of the law supports plaintiff's right to equitable relief.

Article I, Section 7, of the Pennsylvania Constitution provides in part:

> . . . The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

In *Goldman Theatres*, the Supreme Court held that this section prohibits prior restrainst against the free communication of thoughts and opinions independently

of the guarantees provided under the federal Constitution. As a consequence, the general rule has been that equity will not lie to restrain a libel or slander, especially in a non-commercial setting. See *Johnson v. Pilgrim Mutual Ins. Co.*, 284 Pa. Super. 314, 425 A.2d 1119 (1981). The post-restraint rationale of Justice Eagen has not received majority support.

The precise issue in this case was decided adversely to plaintiff by the Pennsylvania Supreme Court in *Willing v. Mazzocone*, 482 Pa. 377, 393 A.2d 1155 (1978). There the Court dissolved a permanent injunction as an invalid prior restraint on speech. The injunction had been obtained by a law firm to prohibit a former client from demonstrating by carrying a "sandwich board" sign denouncing her lawyers as thieves. In holding that equity lacked jurisdiction, Justice Manderino wrote that "the equity court violated appellant's state constitutional right to freely speak her opinion—regardless of whether that opinion is based on
[8] fact or fantasy . . . ." 482 Pa. at 382. In view of this decision, we need not pursue an examination of the federal authorities cited by defendants on the availability of injunctive relief.

Plaintiff's argument that he seeks equity to restrain the republication of defamatory matter (or post restraint) cannot overcome two obstacles. First, there is an adequate remedy at law in the form of money damages, and secondly, there can be no consideration whatever of plaintiff's equitable claim without a determination at law of what activities or publications of the defendants are defamatory.

Pa. R.C.P. 1509(c) recognizes the rule that equity will not act when there is an adequate remedy at law. In applying this principle, the Court in *Willing* noted:

> In Pennsylvania the insolvency of a defendant does not create a situation where there is no adequate remedy at law. In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor.

482 Pa. at 383. See also the concurring opinion of former Chief Justice Roberts at page 384. The Court reached its conclusion despite the apparent indigency of the plaintiff. Here plaintiff has alleged that the defendant newspapers' combined net worth exceeds ten million dollars. We have found no support for plaintiff's argument that the defendants would republish the allegedly defamatory material for economic gain in the face of punitive damage awards that could be enforced. His reliance upon *Doe v. Roe,* 400 N.Y.S.2d 668 (1977), is misplaced. In that case the injunction to prevent
[9] publication of a book written by the defendant psychiatrist detailing the emotional life of one of his patients was based upon a covenant of confidentiality implicit in the physician-patient relationship. No such relationship is pleaded in the present case.

Finally, while we respect the opinion of our sister court in *Ward v. Daugherty,* 71 D. & C. 2d 672 (1974), dismissing preliminary objections to a claim for injunctive relief against a continuing defamation, it appears to be inconsistent with the Supreme Court decision in *Willing,* supra, and we decline to follow it.

Should the defendants persist in republishing defamatory material, even after an adverse verdict, plaintiff may then be able to invoke equitable relief by analogy to a continuing trespass, but he has not pled such a case here. *Cf. Denhart v. Valicenti,* 157 Pa. Super. 143, 41 A.2d 884 (1945).

Finally, plaintiff suggests that the defendants' unquestioned right to a jury trial on the defamation counts (*Willing,* supra; *Goldman Theatres,* supra; *Baltimore Life Insurance Co. v. Gleisner,* 202 Pa. 386, 51 A.2d 1024 (1902)) is satisfied by Pa. R.C.P. 1513 under which a court sitting in equity may submit any or all issues of fact to a jury. Additionally his counsel agreed at oral argument that plaintiff would agree to be bound by such a verdict. However, this argument overlooks several facts: in equity a reference of fact issues to a jury is advisory only to the Chancellor; there is no authority which permits the jury to award compensatory or
[10] punitive damages; and there is no right of appeal from the jury's verdict but only from the decision of the Chancellor. *Gut v. Good,* 178 Pa. Super. 1, 112 A.2d 653 (1955). See generally Goodrich-Amram 2d, Procedural Rules Service, §1513:1; 8 Standard Pa. Practice, Ch. 33, §287.

We conclude therefore that Count I of the complaint fails to state a claim in equity for injunctive relief. The action will be certified to the law side of the court as provided by Pa. R.C.P. 1509(c).

[11] IV. *DO THE PROVISIONS OF THE STATE CONSTITUTION AND THE STATUTE AND RULES PROVIDING FOR THE CONFIDENTIALITY OF JIRB PROCEEDINGS GIVE RISE TO A PRIVATE CAUSE OF ACTION FOR THEIR BREACH?*

Counts IV and VI of the complaint allege that the defendants' publication of the purported JIRB transcripts in violation of the provisions for confidentiality of such proceedings gives rise to a private cause of action under (a) Article I, Section 1 of the Pennsylvania Constitution, (b) 42 Pa. C.S.A. §3334, the statute governing the Board, JIRB Rule 20 and (c) Section 652B of the Restatement, Second, Torts.

The defendants contend that the violation of the confidentiality provisions cannot give rise to a private cause of action against them for breach of the requirement, that none of the other cited authorities do so and that, if they did, such an interpretation would violate the defendants' First Amendment rights under the U. S. Constitution and under Article I, Section 7 of the Pennsylvania Constitution. These arguments must be examined separately since different legal theories are involved.

A. *The Pennsylvania Constitution, Statute and JIRB Rules*

The 1968 revision of the Pennsylvania Constitution provided for the creation of the JIRB as a nine-member board consisting of five judges appointed by the Pennsylvania Supreme Court and four lawyers and laypersons appointed by the Governor. It was created to receive any investigate any misfeasance allegations that are made against state judges or justices and was vested
[12] with authority to make recommendations to the Pennsylvania Supreme Court as to disciplinary action if the situation so warrants. Pa. Const., Art. V, §18(g). The proceedings before the JIRB are to be confidential until the point when the records are filed with the Pennsylvania Supreme Court and at that point they lose their confidential character. Pa. Const., Art. V, §18(h). These sections, and relevant (supporting) sections, read as follows:

> (g) *If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.*

(h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section sixteen of this article. Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. *All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character.* The filing of papers with and the giving of testimony before the board shall be privileged.

* * *

(j) *The Supreme Court shall prescribe rules of procedure under this section.* [Emphasis added throughout.]

Art. V, §18, Pa. Const.

[13] The statute, 42 Pa. C.S.A. §§3331-3334, tracks the language of the Constitution without adding any provisions material to our discussion.

The rules of procedure governing the JIRB (hereinafter cited as JIRB R.P.) dictate the actions of the JIRB in both the preliminary investigation stage (which includes both formal and informal investigation since 1975) and in the formal hearing stage. The rules impose a shroud of confidentiality upon the Board and upon any and all JIRB proceedings. Persons subpoenaed by the JIRB are

also bound by this mandate of confidentiality, and any breach of that confidentiality is "regarded as contempt of the Supreme Court or grounds for discipline under these rules". JIRB R.P. 1(c).

The rules specify the procedure before the JIRB in the event that the preliminary investigation discloses sufficient cause to warrant further proceedings (i.e. "formal proceedings"). JIRB R.P. 2. At this point the proceedings take on an adversarial tenor, with the judge accorded various procedural rights including the right to counsel, the right to introduce evidence on his own behalf, and the right to examine and cross-examine witnesses. JIRB R.P. 7(b). When requested by the JIRB, counsel may also be appointed or assigned to present the case in support of the charges against the judge. JIRB R.P. 5(a). The hearings are to be held before a committee of the JIRB, consisting of not less than three members of the JIRB, at least one of whom shall be a judge. JIRB R.P. 5(d). At the conclusion of the formal hearings, the JIRB considers the record of the proceedings and, upon
[14] a finding of "good cause" (by an affirmative vote of a majority of the JIRB, no abstentions permitted), is directed by the rules to recommend suspension, removal, discipline or compulsory retirement of the judge to the Supreme Court. JIRB R.P. 14. Under Rules 15 and 16 the complete record is then filed with the Supreme Court, which has the option of ordering some form of disciplinary action, of rejecting the recommendation altogether, or of referring the matter back to the JIRB for further proceedings. JIRB R.P. 18.

Rule 20 dictates that "[a]ll papers filed with and proceedings before the Board shall be confidential until a record is filed by the Board in the Supreme Court." JIRB R.P. 20. It is clear, therefore, that the JIRB record loses its mantle of confidentiality when it is filed with the Pennsylvania Supreme Court. JIRB R.P. 20; Pa. Const., Art. V, §18(h). It is likewise clear that the JIRB

record *must* be filed with the Supreme Court when, upon good cause, the JIRB recommends some form of disciplinary action to the Court. JIRB R.P. 16. Furthermore, if the JIRB record is filed with the Supreme Court absent a recommendation of disciplinary action, the record must still lose its confidential character. This is so because neither the constitutional provisions nor the procedural rules differentiate between a Supreme Court filing *with* disciplinary recommendations and a Supreme Court filing *without* disciplinary recommendations. Both Article V, Section 18(h) of the Pennsylvania Constitution and JIRB Rule of Procedure 20 simply mandate that upon filing with the Supreme Court, the record loses its confidential character.

[15] B. *Collateral State Court Proceedings*

After the JIRB dismissed the charges against plaintiff on May 5, 1983, the constitutional mandate for confidentiality of the Board's proceedings became the subject of several collateral lawsuits. We will refer to them at some length due to their relevance to the issues in this action.

The first of these matters involved an application for leave to file a removal petition, brought on April 21, 1983, by Robert B. Surrick, Esquire, one of the attorney-members of the JIRB. The application was captioned: "In Re: Proceedings of the JIRB Concerning 'XYZ', a Certain Member of the Judiciary" (hereinafter referred to as the "XYZ Petition"). Surrick's application essentially sought removal of the record of the Larsen investigation to the Pennsylvania Supreme Court so as to make the JIRB file a matter of public record in accordance with the Pennsylvania Constitution and the JIRB Rules of Procedure. On May 6, 1983, the Court denied the XYZ petition. Associate Justice Larsen was reported as voting with the majority

to deny the petition.[1] In dismissing Surrick's application, the Court held that the JIRB is a constitutionally independent body, "not beholden to [the] court until a recommendation of discipline is filed". It reasoned, therefore, that a matter pending before the Board is not pending before a "court" for purposes of plenary
[16] jurisdiction, and the Pennsylvania Supreme Court had no authority to assume jurisdiction. The defendant newpapers' reporting of this opinion is the basis for Count III of the complaint.

On May 6, 1983, the First Amendment Coalition, the Post-Gazette and the Inquirer filed a petition with the Pennsylvania Supreme Court seeking a writ of mandamus to compel the JIRB to file the record of its investigation of charges against "a member of the judiciary" with the Pennsylvania Supreme Court as a public document. *The First Amendment Coalition, the Pittsburgh Post-Gazette, and the Philadelphia Inquirer v. Judicial Inquiry and Review Board,* _____ Pa. _____, 460 A.2d 722 (1983). The petition was denied on the basis that the Pennsylvania Supreme Court is constitutionally prohibited from granting such a request where the JIRB, as a constitutionally independent body, had made no recommendation to the Court of suspension, removal, discipline or compulsory retirement. In an opinion filed the same day, the Pennsylvania Supreme Court also dismissed a petition filed by the Pennsylvania Bar Association and Frank B. Boyle, requesting that the Court assume jurisdiction over the JIRB proceedings (*In the Matter of Petition of the Pennsylvania Bar Association and Frank B. Boyle,* _____ Pa. _____, 460 A.2d 721 (1983)), for much the same reasons as were advanced in both the XYZ matter and the First Amendment Coalition matter. (It was specially noted that Justice Larsen did not participate in either of the latter decisions.)

[1] The complaint avers that Justice Larsen was unaware of the subject of the petition.

A fourth action was filed in Commonwealth Court by the Pennsylvania Crime Commission. In early June of 1983, the Crime Commission had served a subpoena on
[17] the JIRB seeking, inter alia, the transcripts of the Larsen investigation. In response to the JIRB's motion to quash the subpoena, the Crime Commission filed an enforcement petition in Commonwealth Court. *In re: Petition for Enforcement of a Subpoena to the Pa. JIRB,* _____ Pa. Commonwealth Ct. _____ (No. 1810 C.D., 1983). In an opinion by President Judge Crumlish denying the petition and granting the motion to quash, the Court noted that the subpoena was directed at the same confidential transcripts which had been the subject of the recent Pennsylvania Supreme Court decisions. The Court held that the Crime Commission had not advanced any grounds which would permit it to overcome the constitutional hurdle of confidentiality and that the primary function of the Crime Commission, as a statewide law enforcement agency, was not sufficient to permit enforcement of the subpoena.

In analyzing these decisions of our appellate courts, it is clear that the narrow issue before the Supreme Court was solely that of jurisdiction. Surrick, the First Amendment Coalition, and the State Bar Association petitioned the Court to assume jurisdiction over a matter which has been constitutionally delegated to an independent board. There can be no question that the autonomous nature of the JIRB would be severely compromised if the Supreme Court or anyone else were to monitor its every decision—a danger evidently contemplated by Article V, Section 18(h) of the state Constitution. Article V does not authorize any intrusion upon the domain of the JIRB until some form of disciplinary action is recommended to the Court or the Board files the record of its proceedings.

[18] It is equally clear that we are bound by the decisions of our Supreme Court when it has authoritatively resolved an issue before us. In the present case, however, the validity of the confidentiality provisions for the JIRB proceedings is set in the context of the defendants' First Amendment right of free speech (and publication) under the state and federal Constitutions when sued for defamation. This issue was not presented or decided in any of the above decisions. We conclude therefore that we are required to look further to determine the legal rights of the parties.

[19] C. *First Amendment Coalition, et al. v. JIRB,* _____ *F. Supp.* _____ *(E.D. Pa. 1984) No. 83-0579*

In February, 1983 the First Amendment Coalition, which includes, inter alia, the defendant newspapers and reporters Huysman and Biddle, filed suit in the Federal District Court for the Eastern District of Pennsylvania alleging that Article V, Section 18(h) of the Pennsylvania Constitution and its implementing statute and rules are incompatible with the U. S. Constitution, and sought injunctive relief against their continued enforcement. The reporters sought release from the veil of secrecy imposed on witnesses who were subpoenaed by the JIRB.

The Complaint specifically alleged that the confidentiality mandates are only lifted when the JIRB files a report with the Pennsylvania Supreme Court and recommends disciplinary action against the judge being investigated. In its original answer, the Board denied this allegation and pled that "[i]n practice, a record is filed by defendant with the Supreme Court after a hearing is conducted, whether or not the Board recommends the imposition of discipline." This practice was detailed in a deposition of Richard E. McDevitt, Esquire, Executive Director of the JIRB, taken on May 27, 1983. Mr. McDevitt further indicated that the Board had recently determined,

pursuant to a legal opinion of its special counsel, that the Pennsylvania Constitution precluded the filing with the Supreme Court of any record of Board proceedings when the charges are dismissed. An amended answer to that effect was then filed by the Board, which moved for
[20] summary judgment based in part upon the abstention doctrine.

In dismissing the Board's motion and particularly granting a similar motion by plaintiffs, the Federal District Court by Pollak, J., considered in detail the constitutional issues raised by the pleadings and the McDevitt deposition. The Court addressed the claim of journalists Biddle and Huysman that they could not be prohibited from divulging their own testimony before the JIRB and such other information about the Board inquiry as they may have gleaned in their posture as witnesses. In an analogy to grand jury witnesses, the Court found that "there is a valid state interest in insisting on witness secrecy up to the time the Board record is filed with the Supreme Court" and that plaintiffs Biddle and Huysman are not entitled to a federal constitutional exemption from that obligation merely because they are journalists.

The bulk of the Court's opinion was directed to the First Amendment Coalition's claim that its members are constitutionally entitled to access to all JIRB proceedings relating to charges which are not "obviously unfounded or frivolous". In a lengthy and thorough constitutional analysis of the contentions, the Court recognized the existence of a constitutionally valid state interest in imposing confidentiality upon those involved in the preliminary aspects (both formal and informal) of JIRB proceedings. While acknowledging the state's interest in maintaining confidentiality beyond the

preliminary investigatory stages, the Court found that the value of such an extensive requirement could not withstand the constitutional challenge of the First
[21] Amendment of the U. S. Constitution. "A governmental restriction on public and press access to information about matters of public concern presents a First Amendment question; a restriction on public and press access can be sustained, but only to the extent that it demonstrably advances significant governmental interests." Quoting from Justice Brennan's concurrence in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592, 65 L.Ed.2d 973, 1000, 100 S.Ct. 2814 (1980), the Court noted that "public scrutiny of the operation of a judicial disciplinary body implicates a major purpose of the First Amendment—'discussion of governmental affairs' ". Once it is determined that the protections and freedoms of the First Amendment have been triggered, any governmental restrictions must be shown to be "compelling". The restrictions must be shown to "substantially promote an important governmental objective that cannot be promoted sufficiently by alternative policies having a less restrictive impact on [the public's access to that information]."

In the Court's final analysis, Judge Pollak held that the legitimate concerns of the state which prompted the JIRB confidentiality requirements cease to be constitutionally legitimate at the point where formal charges are lodged against a judge. This holding was premised in part on the fact that only a small percentage of the complaints filed with the JIRB develop into formal charges, and was coupled with the fact that "at least ten [other] states terminate confidentiality between the investigative and hearing stages". This suggested to the Court that "it is entirely possible to administer a workable judicial inquiry and review process without

[22] continuing confidentiality after the hearing has begun". Judge Pollak gave a two-fold response to the JIRB's contention that "the state has a substantial interest in protecting individual judges, and the judiciary as a whole, from the unwarranted tarnish that would accompany the publicizing of charges which [in some instances, at the conclusion of formal hearings] are not proved to the Board's satisfaction". In the first instance, the Court held that such a position assumes that channels of communication are open only to demonstrated truths, a constitutionally inaccurate assumption. Second, by preventing the scrutiny of cases in which the Board dismisses charges, it "prevents the public from making a comprehensive assessment of the standards of judicial conduct applied by the Board and the precision and consistency with which it applies those standards". Judge Pollak summarized the Court's holding by stating that its decision will simply require that the JIRB revert to the practice it followed prior to the instant [i.e. Larsen] investigation, the practice of filing with the Supreme Court the records of proceedings in which charges were dismissed as well as the records of proceedings in which charges were sustained. It further commented that: "The change in practice in the spring of 1983 was arrived at by the Board as a matter of construction of the Pennsylvania Constitution. Since that construction was left undisturbed by the Pennsylvania Supreme Court, it is binding on this federal court. But the construction of the Pennsylvania Constitution on which the Board relies transgresses the First Amendment." The Board has appealed from the federal court's order and decision.

[23] Although this decision of the federal district court is not final, its discussion and legal analysis of the relationship between the confidentiality requirement of

the Pennsylvania Constitution and rules of the JIRB and the defendant's First Amendment rights under the U. S. Constitution merit careful consideration.

It is against this background that we must examine plaintiff's contentions that he has a private cause of action in trespass.

D. *Does the Plaintiff Have a Private Cause of Action Against the Defendants for Breach of the Confidentiality Requirements*?

Assuming for the moment the constitutional validity of those provisions which impose a veil of confidentiality upon JIRB proceedings until such time as the record is filed with the Supreme Court, we must determine whether breach of that confidentiality gives rise to a private cause of action. The plaintiff initially contends that Article I, Section 1, of the Pennsylvania Constitution vests in him a right to reputation and a concomitant right to protect that reputation. We agree. We cannot agree, however, that Article I creates a private cause of action for injury to one's reputation. Article I, Section 1, reads:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

[24] Art. I, §1, Pa. Constitution. By its terms this provision does not create a private cause of action in the plaintiff or in anyone else. It is a portion of Pennsylvania's Declaration of Rights, delineating the rights of individual citizens with respect to the state government in much the same fashion as the federal Bill of Rights.

Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973). It cannot be realistically interpreted as creating a private cause of action for interference with an individual's reputation interests by a non-governmental entity and no authority has been found to support this position.

The plaintiff's next contention is that a private cause of action should be implied from the language and the intent of Article V, Section 18(h) of the Pennsylvania Constitution, from the statute governing the JIRB (42 Pa. C.S.A. §3334), and from Rule 20 of the JIRB Rules of Procedure. The plaintiff argues that such an implied cause of action is necessary to give effect to those provisions. Our review of the respective legislative histories yields nothing of assistance in such an analysis. The express language of the provisions is void of any indication that they were intended to create a private cause of action, and we are reluctant to imply one where none is expressly authorized by statute. *Lindsay v. Thomas*, _____ Pa. Commonwealth Ct. _____, 465 A.2d 122 (1983). If the legislative intent had been to create a separate civil remedy under the confidentiality provisions, the Legislature could have so stated as it has expressly done in similar statutes. (For example, Section
[25] 8351(a) of the Code expressly provides for the imposition of civil liability when civil proceedings are wrongfully initiated or continued.) 42 Pa. C.S.A. §8351(a). We note also that research by counsel and the Court has failed to disclose any precedent from sister jurisdictions with similar confidentiality provisions for judicial disciplinary proceedings, where a private cause of action has been implied. In the absence of precedent and in light of our reluctance to imply a cause of action where none is statutorily provided, we look to other legislative guidance for assistance.

The Statutory Construction Act of 1972 deals with the construction and interpretation of acts of the Pennsylvania General Assembly. 1 Pa. C.S.A. §1921 et seq. Section 1921 prefaces the subchapter by stating that legislative intent is controlling and details some of the factors considered relevant in ascertaining legislative intent when statutory language is not explicit. They include:

(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

[26] 1 Pa. C.S.A. §1921(c). Section 1922 suggests various legislative presumptions which may also be used to glean the legislative intent behind ambiguous provisions. Among those set forth are presumptions:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of thd United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa. C.S.A. §1922.

Utilizing these legislative guidelines, we must carefully consider the plaintiff's argument that unless a private cause of action is read into the JIRB confidentiality provisions, they are meaningless. Since the defendants may not be held in contempt for wrongful out-of-court publication of a pending matter, 42 Pa. C.S.A. §4135(a), and cannot be held criminally liable for their publications, *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 56 L.Ed.2d 1, 98 S.Ct. 1535 (1978), we look to other recourses which may be available to an individual injured by a breach of the JIRB confidentiality mandates.

[27] We do so fully cognizant of our duty to give the fullest possible effect to the statutes, rules and constitutional provisions at issue here and to interpret them—at the very least—in a manner which does not render them meaningless. Accordingly, although we cannot construe the various provisions as creating a private cause of action for their breach per se, we do conclude those provisions confer upon the plaintiff and upon any other party sought to be "protected" by the provisions (e.g., the complainant) a limited right of privacy.

Accordingly, the plaintiff's contention that the confidentiality mandates clothe him with certain privacy interests which he may not otherwise possess, is not wholly without merit. Article V, Section 18(h), 42 Pa. C.S.A. §3334 and Rule 20 of the JIRB Rules of Procedure accord the plaintiff, in essence, statutory a sphere of privacy by virtue of the fact that he is the subject of certain confidential proceedings. Invasion of that privacy may be actionable if such invasion falls within the parameters of the established tort actions dealing with invasions of privacy. (See Count IV, §652B and Count V, §652E.)

Clearly, such a privacy interest, created by statute, may only be protected to the extent that the statute which created it is constitutionally valid. It is necessary, therefore, to determine the constitutional parameters of the confidentiality provisions involved and, accordingly, the parameters of the plaintiff's privacy interest. We do so, once again cognizant of our duty under Pennsylvania law to avoid constitutional issues when faced with the construction of a duly-enacted Pennsylvania statute, if at
[28] all possible, *Commonwealth v. Staley*, 476 Pa. 171, 381 A.2d 1280 (1978), and to avoid declaring a statute, or any portion thereof, unconstitutional unless it "clearly, palpably and plainly violates the Constitution". *Hayes v. Erie Ins. Exchange*, 493 Pa. 150, 425 A.2d 419 (1981); *Wajert v. State Ethics Commission*, 491 Pa. 255, 420 A.2d 439 (1980); *Commonwealth v. Finnegan*, 280 Pa. Super. 584, 421 A.2d 1086 (1980).

The defendants contend that the interests sought to be protected by enforcement of the confidentiality mandates are insufficient to withstand a federal First Amendment challenge. More specifically, they allege that an interest in protecting a judge's reputation and/or the integrity of the judicial system may not be used to suppress

fundamental rights to free speech and free press; that judicial disciplinary proceedings are a matter of utmost public concern; and that, as such, only a compelling governmental interest may preclude public access to such proceedings.

The First Amendment has repeatedly been interpreted as protecting the free discussion of governmental affairs, including courtroom proceedings. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 73 L.Ed.2d 248, 102 S.Ct. 2613 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980); *Mills v. Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966). That right to the free discussion of governmental affairs protects "all members of the public from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch", *Press-Enterprise Co. v. Superior Ct.*, _____ U.S. _____, 78 L.Ed.2d 629, _____ S.Ct.
[29] _____ (1984), and any arbitrary interference with that access is considered to be an abridgement of that right. *Richmond Newspapers, Inc. v. Virginia*, supra. Furthermore, where "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest". *Globe Newspaper Co. v. Superior Ct.*, supra at 606.

The only U. S. Supreme Court case which has dealt squarely with the confidentiality of state judicial review proceedings was *Landmark Communications, Inc. v. Commonwealth of Virginia*, supra. *Landmark*, however, involved a Virginia statute which imposed *criminal* sanctions upon non-participants in the proceedings (including the news media) for divulging or publishing truthful information regarding the board's confidential

proceedings. The Supreme Court held that such an encroachment upon the First Amendment was impermissible. Although the criminal nature of the *Landmark* decision casts it in a different light, we find the reasoning of the Court instructive in the matter before us. The Court stated in *Landmark* that a major purpose of the First Amendment is to protect the free discussion of governmental affairs and that, accordingly, for purposes of the First Amendment, the law gives judges as persons and courts as institutions no greater immunity from criticism than other persons or institutions. An interest in protecting official reputation from injury is an "insufficient reason 'for repressing speech that would otherwise be free', and an interest in protecting the institutional reputation of courts is entitled to no greater weight in the constitutional scales." *Landmark Communications, Inc. v. Commonwealth of Virginia*, supra, at 831; citing *New*
[30] *York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964). Speech cannot be repressed when the purpose is merely "to protect the court as a mystical entity or the judges as individuals or as annointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed." *Bridges v. California*, 314 U.S. 252, 291, 86 L.Ed. 192, 62 S.Ct. 190 (1941) (dissenting opinion).

However, it is an equally well-settled principle of constitutional law that governmental restriction of public access to matters of public concern can be valid to the extent that it does demonstrably advance a significant governmental interest. *Mills v. Alabama*, supra. Such a principle inevitably triggers the delicate balancing of interests which are often in direct conflict with one

another. An examination of the interests which prompted the JIRB confidentiality mandates reveals a desire to protect: (1) complainants and witnesses from reprisal; (2) individual judges from unwarranted criticism, at least until that time when the meritorious complaints can be separated from the frivolous; and (3) the Pennsylvania judiciary, as an institution, from the unwarranted erosion of public confidence likely to flow from frivolous complaints. (See, *Landmark Communications, Inc. v. Commonwealth of Virginia*, supra; *First Amendment Coalition, et al. v. JIRB*, supra.) Such interests are increasingly legitimized when statistics reveal that a large percentage of the complaints initially filed with the JIRB never ripen into formal charges against a judge.
[31] Such statistics lend credence to the plaintiff's contention that there is a substantial state interest in preventing the public airing of all charges filed with the JIRB, and it cannot be denied that a valid interest in protecting those involved in the JIRB process exists to some degree.[2] Additionally, the First Amendment interests involved in attaining access to *all* JIRB proceedings are minimal because it is only when the JIRB proceedings involve non-frivolous complaints that they truly become a matter of public concern.

The issue, therefore, boils down to the continued viability of an otherwise valid confidentiality provision when the proceedings against a judge reach the point of formal charges being lodged against him. Judge Pollak, in his opinion in the matter of the *First Amendment Coalition, et al. v. JIRB*, supra, artfully noted that it is at the point when formal charges are levied that the valid interest served by a confidentiality mandate

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[2] The statistics referenced to were compiled from the deposition of McDevitt; see, *First Amendment Coalition, et al. v. JIRB*, _____ F. Supp. _____ (E.D. Pa., 1984) at pp. 6-8).

become less significant—less significant because immediately prior to filing formal charges against a judge, the JIRB notifies him/her of the nature of the complaint and the facts upon which the charges are based. Accordingly, the confidentiality mandate no longer protects the complainants and/or witnesses from reprisal since the accused would well be able to determine their identities from the complaint itself. Likewise, the state's interest in protecting the accused judge—and in "protecting" the judiciary as a
[32] whole—deteriorates at the point where formal charges are filed because supposedly all of the frivolous complaints have been weeded out in the preliminary proceedings.

We agree with Judge Pollak's analysis, *First Amendment Coalition, et al. v. JIRB,* supra, that the constitutional scales tip in the public's direction at that point when formal charges are filed against a judge. We further concur in his finding that, although the confidentiality provisions become invalid in the face of the federal Constitution when formal charges are *filed*, the least compromising solution is to permit access to JIRB proceedings only at the conclusion of the hearings. In this manner, the interests of the individual are protected until the complete panorama is visible, and yet the public's interest is only slightly abridged by deferring the time of access and not the right to access. For it is clear that the public does have a limited right of access to JIRB proceedings. The fact that a significant portion of those cases in which formal charges are filed are not ultimately the subject of disciplinary recommendations does not serve to dilute the public's right to be informed about the operation of the JIRB and the judiciary.

We conclude that the extensive confidentiality mandates of the Pennsylvania Constitution, the statute and the rules as interpreted by the Board cannot withstand the defendants' First Amendment challenge and that their violation, without more, cannot be actionable when formal charges are filed. Accordingly, the demurrer to Count VI is sustained. In view of our
[33] conclusion that the defendants' publication is not actionable for this purpose, leave is not given to amend this cause of action.

However, the foregoing analysis demonstrates that the legitimate and constitutionally valid purposes of the confidentiality provisions only have meaning if construed to create an area of privacy for the participants, whether it be the complainant or a judge, and that the standards for such an action should be as set forth in Section 652 of the Restatement, Second, Torts.

[34] *V. DOES COUNT IV SET FORTH A CAUSE OF ACTION UNDER SECTION 652B OF THE RESTATEMENT, SECOND, TORTS?*

Count IV of the plaintiff's amended complaint, paragraph 110, alleges that "in procuring and causing the purported confidential [JIRB] transcript to be published and republished, the defendants acted in violation of . . . the Restatement, Second, Torts §652B". Section 652B provides that:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement, Second, Torts §652B (1977). The comments to Section 652B note that it is the intrusion itself—and not necessarily the publication of the information received by such intrusion—which subjects a defendant to liability. Likewise, the comments emphasize that for such an intrusion to be actionable under this section, the intrusion must have been "substantial", i.e., of a kind that would be highly offensive to the ordinary reasonable person.

This section is clearly not intended to be a panacea for those who have merely been embarrassed or annoyed by an unintentional invasion of what they consider to be their private affairs. Properly invoked, however, this section provides relief for those whose legitimate privacy interests have been intentionally ignored by another. Pennsylvania courts have acknowledged that this section
[35] may create a cause of action in tort. *Vogel v. W. T. Grant Co.*, 458 Pa. 124, 327 A.2d 133 (1974); *Marks v. Bell Telephone Co.*, 460 Pa. 73, 331 A.2d 424 (1975). There are, however, three rather significant requirements which must be met before liability is triggered. The defendants must have (1) intentionally intruded upon (2) the private affairs of the plaintiff, and (3) that intrusion must have been of a kind that would be highly offensive to a reasonable person.

Applying those requirements to the amended complaint, we have little difficulty in finding that the defendants' actions were intentional. To determine whether or not there was an intrusion upon the plaintiff's private affairs by the defendants, we note that the term "intrusion" contemplates action that is uninvited and/or offensive to the person intruded upon. In view of our determination that the JIRB confidentiality mandates clothe the plaintiff with a limited right to privacy, a

right that he might not otherwise possess in his statute as an Associate Justice of the Pennsylvania Supreme Court,[3] we find that the publication of any portion of the JIRB proceedings prior to that point in time when they would become a matter of public record was an intrusion upon the plaintiff's right to privacy.

Whether the defendants herein have intruded upon the plaintiff's privacy, and whether they have done so in such a manner or to such an extent as to be highly
[36] offensive to a reasonable person, remains to be seen. We cannot so find on the record before us. Count IV of the plaintiff's amended complaint merely charges the defendants with having procured, published and republished the purported confidential transcripts. Such an allegation, standing alone, is clearly inadequate under the standards enumerated above to state a cause of action for the invasion of privacy. Accordingly, the demurrer to Count IV is sustained and the plaintiff is given leave to amend his pleading to set forth those specific publications and acts of the various defendants which substantially invaded the privacy interests accorded him by the JIRB confidentiality provisions.

[37] VI. *DOES COUNT V SET FORTH A CAUSE OF ACTION UNDER THE RESTATEMENT, SECOND, TORTS §652E?*

In Count V the plaintiff again incorporates by reference almost all of the first 102 paragraphs of the amended complaint. Paragraphs 117 and 118 aver:

> 117. By publishing and republishing less than the whole truth, publishing and republishing purposely selected purported confidential excerpts and

[3] We note that the plaintiff's privacy interests are limited to those which he possesses by virtue of the various confidentiality provisions; he cannot claim any additional privacy interests at this juncture.

publishing and republishing false statements, defendants have falsely attributed to plaintiff views that he does not hold and actions which he did not perform, thereby maliciously placing plaintiff before the public in a false light.

118. The willful, wanton, reckless and intentional publication of false statements and the failure on the part of the defendants to publish the whole truth is a serious, highly offensive, illegal and unreasonable invasion of plaintiff's interests. The defendants knew at the time they published and republished the selected purported confidential excerpts that they were not placing plaintiff before the public in a true light, or if they did not know it, their failure to determine the fairness and accuracy of their publications, particularly when the entire purported confidential record was in their possession and control, was in utter and reckless disregard of its truth or falsity and was, therefore, published with malice.

Plaintiff thus seeks to bring a separate cause of action under Section 652E of the Restatement, Second, Torts. Section 652E reads:

§652E. Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

[38] (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement, Second, Torts §652E (1977).

The PNI defendants and Surrick demur to this count on the basis that it fails to set forth a "false light" claim and that the defendants' conduct was not highly offensive to reasonable persons.

The courts of this Commonwealth have narrowly drawn the parameters for a cause of action under a false light theory. *Vogel v. W. T. Grant Co.*, supra; *Marks v. Bell Telephone Co. of Pa.*, supra. Despite references to this section of the Restatement in several federal district court decisions,[4] however, there is considerable doubt whether the Pennsylvania Supreme Court has adopted Section 652E. We find that plaintiff's allegations, in paragraphs 117 and 118, of false views and/or actions attributed to him by the defendants, cannot sustain an independent cause of action. The plaintiff's general allegations are insufficient to state a cause of action under a false light theory. The plaintiff must allege with specificity which statements by the defendants were allegedly false, were highly offensive and were published with knowledge or in reckless disregard of their falsity.
[39] It is important to note that the truth or falsity of the statements themselves is not at issue in this count. The defendants can only be held liable for the accuracy or inaccuracy of their reporting and not for the veracity of the statements in the transcripts over which they had no

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[4] *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525 (E.D. Pa. 1982); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081 (E.D. Pa. 1980); *Bromhall v. Rorvik*, 478 F. Supp. 361 (E.D. Pa. 1979).

independent knowledge or control, absent actual knowledge or reckless disregard on the part of the defendants. *New York Times v. Sullivan*, supra.

The plaintiff alternatively alleges that the defendants maliciously placed him in a false light before the public by publishing and republishing only carefully selected excerpts of the purported confidential transcripts. The issue here is whether the defendants had a legal obligation, as the plaintiff alleges, to publish either the "whole truth" or none at all. The defendants contend that they have no such obligation, but are free to pick and choose what they print and to edit as they see fit, provided they do not supplement the truthful excerpts with defamatory statements. The defendants argue that the plaintiff's all-or-nothing theory would unconstitutionally chill their First Amendment freedoms. We agree.

> "A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831 (1974) (footnote omitted).

[40] As a matter of law, we are unable to find that the complaint sets forth a cause of action against the defendants for violating their responsibility in this regard.

Accordingly, the demurrer to Count V is sustained. Plaintiff is given leave to amend his pleading in light of the foregoing.

[41] VII. *DOES COUNT VII SET FORTH A CAUSE OF ACTION UNDER 42 PA. C.S.A. §4135?*

In Count VII, plaintiff alleges that "the defendants' actions were in violation of 42 Pa. C.S.A. §4135" and that he is entitled to compensatory and punitive damages for that violation. This section reads:

> §4135. Publication out of court
>
> (a) General rule.—Publication out of court respecting the conduct of judges, district justices, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal shall not be construed as a contempt of court on the part of the author, publisher or other person connected with such publication.
>
> (b) Civil and criminal liability not affected.—If any publication specified in subsection (a) shall improperly tend to bias the minds of the public, or of the tribunal, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal, any person aggrieved thereby may proceed against the persons responsible for the publication by appropriate civil action or criminal proceeding.

42 Pa. C.S.A. §4135. 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978. (Renumbered §4135 and amended 1982, Dec. 20, P.L. 1409, No. 326, Art. II, §201, effective in 60 days.)

After incorporating most of the first 102 paragraphs of the complaint, plaintiff alleges in paragraph 128:

> 128. The aforementioned publication and republication by defendants has caused extreme and irreparable harm to plaintiff's interest in (1) having

[42] the matters resolved by individuals who have not been exposed to such publications and republications of defendants; (2) having justice administered without any question of bias or suggestion of bias; (3) having justice administered by individuals who are not predisposed; and (4) having the resolution of the matter presented to a public and electorate which has not been exposed to defendants' publications.

This count is totally lacking in factual specificity. We cannot accept the argument in plaintiff's brief that what was intended is that the defendants' publication of the JIRB proceedings prior to the decisions of the Pennsylvania Supreme Court and the Federal District Court, supra, was intended to bias those Courts in their decisions of whether to require public access to the Board's proceedings involving plaintiff. While this would lead us to require plaintiff to further amend the complaint, we believe that there is a more basic legal problem with this count.

The defendants argue that plaintiff lacks standing to sue under this section and that if the act is intended to create a separate cause of action independent of and supplemental to his claims for defamation and invasion of privacy, it violates the Pennsylvania Constitution and the First Amendment to the U. S. Constitution.

We have concluded that Section 4135 does not create a separate cause of action but without the necessity of reaching the constitutional issue. There is apparently no legislative history interpreting this statute. It is significant, however, that the 1982 amendment changed the former language in paragraph (b) which read that "any person ... aggrieved ... may proceed ... by appropriate civil or criminal action or proceeding *as in*

[43] *other cases of wrongful publication*" [emphasis added], to read "may proceed . . . by appropriate civil action or criminal proceeding."

Clearly the former language could not reasonably be construed to create an independent cause of action. Nor have we been able to find any case law to support such an interpretation under the present or any prior version of the Act. It appears to us that the intendment of Section 4135, which dates in varying form to 1836, was to abolish rather than to create a form of action. Thus paragraph (a) is now stated in the negative, that contempt of court and attachment is not a permissible recourse for wrongful publication. Paragraph (b) appears to be merely definitional, setting forth the right of an aggrieved person to proceed by other appropriate avenues of recourse. Thus, we conclude that the section merely leaves the person aggrieved by wrongful publication to the "appropriate" civil or criminal remedies that are already available to him for such a publication. The demurrer to this count is sustained without leave to amend since it is clear that there is no legal basis for relief under 42 Pa. C.S.A. §4135.

[44] VIII. *DOES COUNT II SET FORTH A CAUSE OF ACTION FOR DEFAMATION*?

Count II of the complaint alleges that the PG defendants falsely accused plaintiff of perjury and lying under oath in certain articles published on November 19 and 20, 1982, and March 9, 1983. These articles referred in part to proceedings before the JIRB. While the PG defendants filed a general demurrer to the complaint, they did not file a specific demurrer to this count; nor did they brief or argue the matter. Accordingly, we deem it waived.

[45] IX. *DOES COUNT III SET FORTH A CAUSE OF ACTION CONCERNING THE XYZ PETITION?*

Count III charges all of the defendants with defamation arising from their reporting of the disposition of the XYZ petition filed by Surrick in the Pennsylvania Supreme Court. As to this count, also, the defendants filed only a general demurrer and none of them briefed it. Only cursory mention of it was made at oral argument by counsel for two of the defendants. Accordingly, we deem the preliminary objection to legal sufficiency waived until such time as all parties have an opportunity to address the question in a proper context.

[46] X. *MOTION FOR A MORE SPECIFIC PLEADING*

The defendants have moved that the plaintiff be ordered to file more specific pleadings to those counts of the complaint which have survived their demurrers. The foregoing opinion has directed the plaintiff to specifically plead over his cause of action under Counts IV and V which allege an invasion of his privacy interests and dismissed Counts I, VI and VII. The defendants' motions are therefore moot as to those counts.

We are left with the defendants' allegations that the plaintiff has not specifically pled the counts in defamation (Counts II and III). The defendants contend that the plaintiff has not adequately specified which portions of the voluminous articles published by the defendants are allegedly defamatory or which of the individual defendants were responsible for said publications. The defendants further contend that the plaintiff has not made any specific, non-conclusory allegation as to joint action by the defendants as is required by Pa. R.C.P. 1019. Relevant portions of Rule 1019 provide that:

(a) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.

(b) . . . Malice, intent, knowledge, and other conditions of mind may be averred generally.

* * *

(f) Averments of time, place and items of special damage shall be specifically stated.

Pa. R.C.P. 1019.

[47] After careful review of the plaintiff's amended complaint, including the appendix, we find that the defamation counts are sufficiently specific and accordingly dismiss the defendants' motions for a more specific complaint. The defendants' contention that the plaintiff is in a position to allege which individuals were responsible for which publications at this point in the proceedings is not well taken. That information is more properly the subject of discovery proceedings and should not be the target of a motion for more specific pleadings, provided that the pleadings are sufficiently detailed so as to apprise the defendants of the nature of the action. The related contention that the plaintiff did not adequately plead any joint action on the part of the defendants is likewise without merit. Analogizing to the requisite pleadings in a civil conspiracy action, we find that a plaintiff adequately pleads joint activity if he "allege[s] facts that if proved will support an inference of the combination and its intent". *Baker v. Rangos,* 229 Pa. Super. 333, 324 A.2d 498 (1974). We find that the plaintiff herein has done so.

[48] XI. *MISCELLANEOUS*

The PNI defendants and Surrick demur to those portions of plaintiff's claims which relate to any publication prior to November 10, 1982, citing the one-year statute of limitations set forth in 42 Pa. C.S.A. §5523. While the defense of a waivable statute of limitations is more properly raised as New Matter in accordance with Pa.R.C.P. 1017(b)(4) and 1030, the plaintiff by brief and at oral argument acquiesced in that demurrer, acknowledging that no publication prior to November 10, 1982, could form a basis for Counts II through VII of his complaint. Counsel stated that such publications were only included to illustrate a continuous course of action on the part of the defendants. Accordingly, the demurrer to those portions of plaintiff's claims which relate to any publication prior to November 10, 1982, is sustained.

The PNI defendants and Surrick have moved to strike paragraph 101 of the amended complaint, which purports to set forth the combined net worth of all defendants, as improper, impertinent and prejudicial. Such an allegation is relevant only to the issue of punitive damages and the defendants should not be required to admit or deny such an allegation in the pleading stage. The motion to strike paragraph 101 of the plaintiff's complaint is granted. The motions to strike off the entire complaint are denied and dismissed in accordance with the foregoing opinion.

The PG defendants, the PNI defendants and Surrick included in their preliminary objections a petition raising the defense of lack of capacity to sue. More specifically,
[49] they allege that plaintiff lacks standing to raise the claims set forth in Counts I, IV, VI and VII of his complaint. In view of the foregoing opinion, the allegations of lack of standing are moot; the petition raising the defense of plaintiff's lack of capacity to sue is dismissed.

ORDER OF COURT

AND NOW, this 16th day of May, 1984, the defendants' preliminary objections to the amended complaint are disposed of as follows:

1. The demurrer to Count I is sustained. The action is transferred to the law side of the court in accordance with Pa. R.C.P. 1509(c).

2. The demurrer to Count IV is sustained. Plaintiff is given leave to file a second amended complaint to plead the facts which he contends give rise to his cause of action under Section 652B of the Restatement, Second, Torts, within twenty (20) days from the date of this order.

3. The demurrer to Count V is sustained. Plaintiff is given leave to file a second amended complaint to plead the facts which he contends give rise to his cause of action under Section 652E of the Restatement, Second, Torts, within twenty (20) days from the date of this order.

4. The demurrer to Count VI is sustained. Leave is not given to plead over in view of our conclusion that a private cause of action does not exist.

5. The demurrer to Count VII is sustained. Leave is not given to plead over in view of our conclusion that a private cause of action does not exist.

6. The non-specific demurrers to Counts II and III are denied. The motions for a more specific complaint as to said counts are likewise denied.

7. The defendants' demurrer based upon the statute of limitations is sustained as to any publications prior to November 10, 1982.

8. The motion to strike paragraph 101 of the amended complaint is sustained and it is stricken.

9. The petitioners raising the defense of lack of capacity to sue are denied.

BY THE COURT,

ALFRED T. WILLIAMS, JR.
Alfred T. Williams, Jr., *Judge*
Specially Presiding

APPENDIX D
Order of the Court of Common Pleas of Allegheny County, Pennsylvania Dated June 20, 1984.

ORDER OF COURT

AND NOW this 20th day of June, 1984, the plaintiff's motion to amend the order of May 16, 1984, is granted. Upon consideration of plaintiff's motion and the defendants' answers thereto, we find that paragraphs 2, 3, 4 and 5 of the May 16, 1984, order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

Accordingly, the plaintiff's motion to stay is also granted. Any further proceedings before this Court in the above matter are hereby stayed pending a decision by our appellate courts regarding immediate appeal of the May 16, 1984, order.

BY THE COURT,

/s/ Alfred T. Williams, Jr.
Alfred T. Williams, Jr., Judge
Specially Presiding

APPENDIX E
Amended Complaint.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD83-19240
Issue Number:
Code: 020
AMENDED COMPLAINT IN EQUITY

ROLF LARSEN,

Plaintiff,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., ROBERT SURRICK,

Defendants.

Filed on Behalf of:
Plaintiff Rolf Larsen

Counsel for Plaintiff:

David J. Armstrong
Pa. I.D. #00379

Robert W. Hastings
Pa. I.D. #27682

DICKIE, McCAMEY & CHILCOTE, P.C.
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IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

AMENDED COMPLAINT IN EQUITY
Civil Action No.: GD 83-19240
Code: 020

ROLF LARSEN,

Plaintiff,

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PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., ROBERT SURRICK,

Defendant.

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the

complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

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The Allegheny County Bar Association
920 City-County Building
Pittsburgh, Pennsylvania 15219
Telephone: 412-261-2088

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

Civil Action No.: GD 83-19240
JURY TRIAL IS REQUESTED

ROLF LARSEN,

Plaintiff,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., ROBERT SURRICK,

Defendants.

AMENDED COMPLAINT

COMES NOW Plaintiff Rolf Larsen, by his attorneys, Dickie, McCamey & Chilcote, P.C., and files this Amended Complaint for relief against Defendants Philadelphia Newspapers, Inc., Knight-Ridder Newspapers, Inc., PG Publishing Co., William Block, Paul Block, Jr., Daniel R. Biddle, Edwin Guthman, Sam S. McKeel, Fritz Huysman, Eileen Foley, John G. Craig, Jr., and Robert Surrick because of the publication and republication of libelous statements, invasions of privacy, and an extreme and outrageous course of joint conduct including continuing malicious libels which

defendants have written, approved, published, republished, and/or caused to be published and republished in *The Philadelphia Inquirer* (hereinafter referred to as "Inquirer"), a daily newspaper published by defendant Philadelphia Newspapers, Inc. and Knight-Ridder Newspapers, Inc. and *The Pittsburgh Post-Gazette* (hereinafter referred to as "Post-Gazette"), a daily newspaper published by PG Publishing Co., and alleges as follows:

COUNT I:

PERMANENT INJUNCTION FOLLOWING JURY ADJUDICATION

(MALICIOUS DEFAMATIONS)

1. Plaintiff is a duly elected Justice of the Supreme Court of Pennsylvania and at all times relevant herein has been a resident of the County of Allegheny, Commonwealth of Pennsylvania.

2. Defendant Philadelphia Newspapers, Inc. is a corporation engaged, in part, in the business of publishing the Inquirer and has a business address of 400 North Broad Street, Philadelphia, Pennsylvania, 19130. The Inquirer has a daily circulation of well over 800,000 copies, with an approximate daily readership of more than 2,000,000 persons. The readership of the Inquirer resides throughout the Commonwealth of Pennsylvania and the Inquirer is sold and distributed in the County of Allegheny.

3. Defendant Knight-Ridder Newspapers, Inc., a corporation, owns, operates, and controls Philadelphia Newspapers, Inc. and has its principal place of business located at One Herald Plaza, Miami, Florida, 33101.

4. Defendant PG Publishing Co., 50 Boulevard of the Allies, Pittsburgh, Pennsylvania, is a corporation engaged in the business of publishing "The Pittsburgh Post-Gazette", a newspaper of general circulation in Pennsylvania. The Pittsburgh Post-Gazette has a daily circulation of approximately 179,438 copies with an approximate daily readership of well over 450,000. The readership of the Post-Gazette resides throughout the Commonwealth of Pennsylvania and the Post-Gazette is sold and distributed in the County of Allegheny.

5. Defendants William Block and Paul Block, Jr. are individuals who are the publishers of Pittsburgh Post-Gazette and have an address of 50 Boulevard of the Allies, Pittsburgh, Pennsylvania.

6. Defendant Daniel R. Biddle is an individual employed by Philadelphia Newspapers, Inc. as a reporter for the Inquirer and has an address of 400 North Broad Street, Philadelphia, Pennsylvania 19130.

7. Defendant Edwin Guthman is an individual employed by Philadelphia Newspapers, Inc. as the Editor of the Inquirer and has an address of 400 North Broad Street, Philadelphia, Pennsylvania 19130.

8. Defendant Sam S. McKeel is an individual employed as President of Philadelphia Newspapers, Inc. and has an address of 400 North Broad Street, Philadelphia, Pennsylvania, 19130.

9. Defendant Fritz Huysman is an individual employed by PG Publishing Co. as a reporter for The Pittsburgh Post-Gazette and has an address of 50 Boulevard of the Allies, Pittsburgh, Pennsylvania.

10. Defendant Eileen Foley is an individual employee by PG Publishing Co. as a reporter for The Pittsburgh Post-Gazette and has an address of 50 Boulevard of the Allies, Pittsburgh, Pennsylvania.

11. Defendant John G. Craig, Jr. is an individual employed by PG Publishing Co. as the Editor of the Post-Gazette and has an address of 50 Boulevard of the Allies, Pittsburgh, Pennsylvania.

12. Defendant Robert Surrick is an individual with an address at 223 North Monroe Street, Media, Pennsylvania 19063, who at relevant times herein acted individually, in concert with, and/or as an agent, servant and employee of the Inquirer and Post-Gazette.

13. On Friday, December 5, 1980, the defendants published or caused to be published in the Inquirer an article entitled "Larsen opposes Nix, politics on the bench?" and in the Post-Gazette articles entitled "Justice Larsen linked to wide political dealing" and "Stag dinners attended by Larsen, political figures."

14. The aforementioned articles which were published on December 5, 1980 contain accusations and allegations of "political activity" and "racism" on the part of plaintiff.

15. The aforementioned articles which were published on December 5, 1980 are part of a large number of subsequent articles published in the Inquirer and Post-Gazette regarding plaintiff which contain allegations and accusations of "political activity", "racism", "favoritism", and "influence peddling."

16. Following the aforesaid December 5, 1980 publications by defendants, Chief Justice Henry X. O'Brien indicated to defendants that he was requesting the Judicial Inquiry and Review Board to initiate an investigation of matters which were published in the Inquirer and/or Post-Gazette.

17. Following the aforesaid December 5, 1980 publications by defendants, the Judicial Inquiry and Review Board undertook an investigation of the defendants' allegations concerning plaintiff.

18. On or about June 1, 1982, the Judicial Inquiry and Review Board (hereinafter "JIRB") commenced formal hearings in the matter of inquiry concerning plaintiff.

19. Upon commencement of the aforesaid hearings before JIRB, precautions were taken to insure the confidentiality of the proceedings.

20. With reference to JIRB, Article V, Section 18(n) of the Constitution of the Commonwealth of Pennsylvania provides, in part:

> "All papers filed with and proceedings before the board *shall be confidential* but upon being filed by the board in the Supreme Court, the record shall lose its confidential character." (Emphasis added).

21. By statute, 42 Pa. C.S.A. §3334, of the Commonwealth of Pennsylvania, it is provided:

> "*Proceedings Confidential:* All papers filed with and proceedings before the Judicial Inquiry and Review Board *shall be confidential* but upon being filed by the board in the Supreme Court, the record shall lose its confidential character." (Emphasis added).

22. Pursuant to the Constitution of the Commonwealth of Pennsylvania, the Supreme Court of Pennsylvania promulgated by Order which was effective July 1, 1969 the Rules of Procedure Governing the Judicial Inquiry and Review Board including:

> "Rule 20. Confidentiality of Proceedings: All papers filed with and proceedings before the Board *shall be confidential* until a record is filed by the Board in the Supreme Court." (Emphasis added).

23. The aforesaid precautions which were undertaken by JIRB were to protect the parties, the witnesses, and the confidentiality of the papers and proceedings before

JIRB as required by the Constitution, statute, and the Rules of Procedure of the Commonwealth of Pennsylvania.

24. The Judicial Inquiry and Review Board has never filed the record of its aforementioned inquiry concerning plaintiff with the Supreme Court; the record has not been filed because the decision of the Judicial Inquiry and Review Board after completion of the inquiry was to exonerate plaintiff.

25. The defendants have publicly announced that they have a complete copy of the transcript of the proceedings before JIRB involving plaintiff.

26. On Wednesday, June 2, 1982, defendants published, republished or caused to be published purportedly confidential information in the Inquirer and Post-Gazette concerning what had allegedly transpired at the JIRB evidentiary hearing regarding plaintiff on Tuesday, June 1, 1982. Defendants have a copy of the aforesaid publication in their possession and control.

27. Defendants, on at least the following dates, published, republished or caused to be published purportedly confidential information in the Inquirer concerning what had allegedly transpired during the JIRB inquiry concerning plaintiff: June 3, 4, 5, 8, 10, 16, 17, 22, 25, and 29, 1982, July 1, 5, 20, and 21, 1982, November 10, 16, and 17, 1982, January 12, 1983, April 11, 12, 13, 15, and 21, 1983, May 1, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 22, and 27, 1983. Defendants have copies of the publications in their possession and control; copies of all of the articles referred to in the Amended Complaint are included within "Appendix A" to Plaintiff's Complaint.

28. Defendants, on at least the following dates, published, republished, or caused to be published purportedly confidential information in the Post-Gazette concerning what had allegedly transpired during the JIRB inquiry concerning plaintiff: June 3, 4, 5, 8, 9, 17, 18, 30, 1982, July 1, 6, 20, 21, 22, 23, 1982, October 5, 1982, November 17, 18, 19, 20, 1982, April 12, 19, 20, 22, 1983, May 5, 9, 10, 14, 28, 1983, June 11, 14, 15, 18, 1983, July 21, 1983 and September 9, 1983. Defendants have copies of the publications in their possession and control.

29. On Friday, November 19, 1982, defendants, individually and in concert with each other, published, republished or caused to be published an article entitled "Larsen denies visit to Colville" in the Post-Gazette.

30. In the aforementioned November 19, 1982 article, there appeared the following:

> "State Supreme Court Justice Rolf Larsen yesterday denied visiting the office of County District Attorney Robert E. Colville and suggesting then that the district attorney consider running for the Supreme Court.
>
> Larsen made the denial under cross-examination before a special investigative panel of the state Judicial Inquiry and Review Board in Philadelphia.
>
> The Post-Gazette reported December 5, 1980, that Larsen admitted to calling on Colville in Colville's office in the spring of 1980 and suggested then that the district attorney consider running for the Supreme Court."

31. On Saturday, November 20, 1982, defendants, individually and in concert with each other, published,

republished, or caused to be published an article entitled "Probe gets Larsen-interview tape" in The Pittsburgh Post-Gazette.

32. In the aforementioned November 20, 1982 article, "Probe gets Larsen-interview tape", there appeared the following:

> "The Post-Gazette released under subpoena yesterday an excerpt of a tape-recorded interview which contained statements by state Supreme Court Justice Rolf Larsen which Larsen, while under oath, has denied making.
>
> In the excerpt, Larsen admitted visiting the office of Allegheny County District Attorney Robert E. Colville and then suggesting that the district attorney run for the Supreme Court.
>
> Larsen denied Thursday before a special investigative panel of the state Supreme Court's Board of Judicial Inquiry and Review that he made the visit to Colville's office during the spring of 1980.
>
> Both Larsen and Colville were quoted as having admitted the meeting in a Post-Gazette article published December 5, 1980.
>
> Larsen made his denial Thursday under cross-examination by Richard Sprague . . . ."

33. On Wednesday, March 9, 1983, defendants published, republished, or caused to be published an article entitled "Judges shouldn't be judging judges" in the Post-Gazette.

34. In the aforementioned March 9, 1983 article in the Post-Gazette there appeared the following:

"Your inconsistency is painful. On Nov. 20, 1982, in a front-page article, you accused one of our State Supreme Court judges—Rolf Larsen—of perjury."

35. The aforementioned November 19, 1982, November 20, 1982 and March 9, 1983 Post-Gazette articles state and/or imply that plaintiff (1) lied under oath and (2) committed perjury or uttered false statements in testifying under oath before the Judicial Inquiry and Review Board on Thursday, November 18, 1982.

36. The November 19, 1982 and November 20, 1982 articles which were published, republished, or caused to be published by defendants are false. Plaintiff did not deny under oath that he made a visit to District Attorney Robert E. Colville's office in the Spring of 1980.

37. At the time of the publication and republication of the aforementioned articles on November 19 and 20, 1982, defendants knew that the allegations contained therein were false, or if they did not know, their failure to determine the accuracy of the articles prior to publication and republication was in utter and reckless disregard of its truth or falsity. The publication and republication of the articles by defendants was defamatory, actionable per se, and was published with malice.

38. On Friday, April 21, 1983, defendant Robert Surrick filed with the Supreme Court of Pennsylvania a document which was captioned "Application of Robert B. Surrick, a member of the Judicial Inquiry and Review Board, In Re: Proceedings of the Judicial Inquiry and Review Board concerning 'XYZ', a certain member of the Judiciary" (hereinafter referred to as "XYZ Petition") and titled the document "Application for Leave to File Petition".

39. The relief prayed for by Robert B. Surrick, Esquire, (hereinafter "Surrick") in the XYZ Petition was "leave to file his Removal Petition under seal, or in the alternative, grant him leave to file his Removal Petition without placing it under seal." The "Removal Petition" was not attached to or made a part of Surrick's filed document entitled "Application for Leave to File Petition".

40. The XYZ Petition does not identify the member of the judiciary who was the subject of the JIRB inquiry.

41. The XYZ Petition does not identify plaintiff as the member of the judiciary who was the subject of the JIRB inquiry.

42. No oral argument had been made by or on behalf of Surrick and no documents, other than the XYZ Petition, were before the Supreme Court when the Supreme Court decided whether to afford the relief requested in the XYZ Petition.

43. By letter dated May 5, 1983, the Judicial Inquiry and Review Board advised plaintiff that he had been exonerated of the charges and the proceedings instituted against him had been dismissed; furthermore, the Board advised plaintiff that the record of the proceedings shall remain confidential.

44. On Friday, May 6, 1983 the Supreme Court voted 5-2 to deny the XYZ Petition.

45. At all times relevant hereto, and certainly before Friday, May 6, 1983, defendants knew of the aforementioned confidentiality of JIRB proceedings as mandated by the Constitution, statute, and aforementioned Rules of Procedure.

46. On or before Friday, May 6, 1983, defendants had received and/or reviewed all or part of the purported confidential transcript and record of the matter of inquiry concerning plaintiff.

47. On the dates when defendants received and reviewed the purported confidential transcript and record the defendants knew that the constitutional, statutorial and procedural mandates of confidentiality applied to them and, specifically, applied to newspapers; defendants, and each of them, knew that the aforementioned confidential transcript and record was not a "public record" within the provisions of the "Right to Know Act", 65 P.S. §66.1 *et seq.*, that the confidential transcript and record had not been made a public record, and that the disclosure of the confidential record to or by them was illegal and a violation of the aforementioned Constitution, statute and procedural rules of confidentiality.

48. On or about Friday, May 6, 1983, defendants initiated litigation in the form of a "Petition for a Writ of Mandamus" before the Supreme Court of the Commonwealth of Pennsylvania requesting an "Order of Mandamus" directing the Judicial Inquiry and Review Board to file as a public record the complete record of the formal proceedings in the matter concerning Plaintiff.

49. Immediately after defendants initiated the Friday, May 6, 1983 filing of the aforementioned Petition for a Writ of Mandamus and prior to the Supreme Court's having an opportunity to rule on said Writ (the Supreme Court did not deny the Writ until May 27, 1983), defendants proceeded on a course of conduct which resulted in the publication on Sunday, May 8, 1983 of

excerpts selected by defendants from the aforementioned purported confidential record in the form of an article entitled "Now the people will judge".

50. Thereafter, on at least May 9, 10, 11, 12, and 14, 1983, defendants continued to publish, republish, or cause to be published excerpts selected by defendants from the aforementioned purported confidential record in the Inquirer and/or Post-Gazette.

51. Upon information and belief, the defendants had in their possession and control portions of the purported confidential transcript and record presented to the JIRB which exonerated and exculpated plaintiff of the charges of having engaged in "political activity", "racism", "favoritism" and "influence peddling".

52. The defendants did not publish portions of the purported confidential transcript which exonerated and exculpated plaintiff, and which refuted the charges, but rather purposely selected and published or caused to be published only those excerpts selected by defendants which, when taken out of context, attempted to portray plaintiff in a negative light by casting false aspersions upon the character and integrity of plaintiff through the publication of purposely selected portions of the purported confidential transcript and record.

53. The aforementioned publications and republications by defendants were made out of court in connection with matters pending before the Supreme Court of Pennsylvania, JIRB, and the U.S. District Court for the Eastern District of Pennsylvania.

54. The aforementioned publications and republications by defendants were respecting the conduct of judges, systems or related personnel and/or

participants in connection with matters pending before the Supreme Court, JIRB, and the U.S. District Court for the Eastern District of Pennsylvania.

55. The publication and republication of the aforementioned articles by defendants were focused attempts to influence opinion regarding particular decisions to be made by the Supreme Court, JIRB, and the U.S. District Court for the Eastern District of Pennsylvania.

56. The aforementioned publications and republications regarding pending controversies was and is intended to operate as an extraneous influence with a corroding effect on the process of justice in the Commonwealth of Pennsylvania.

57. The publication and republication by defendants of the aforementioned articles was intended to and improperly tends to bias the minds of the public, the Supreme Court, JIRB, the U.S. District Court for the Eastern District of Pennsylvania, other systems or related personnel, and/or participants in connection with matters pending before the Supreme Court, JIRB, and the U.S. District Court for the Eastern District of Pennsylvania.

58. On Sunday, May 8, 1983, the defendants, acting individually and in concert with each other, published, republished, or caused to be published an article entitled "Now the people will judge" in the Inquirer.

59. In the aforementioned article, "Now the people will judge", there appeared the following:

> "For 28 months, the Pennsylvania Judicial Inquiry and Review Board held closed hearings into charges that Supreme Court Justice Rolf Larsen violated the

court's Code of Judicial Conduct. That proceeding came to an end last week with Justice Larsen's exoneration.

The Board then voted, 5-3, that the entire record of the investigation, including its findings, be sealed forever. One of the dissenting members petitioned the Supreme Court to consider reviewing the case and thus perhaps opening the record.

The Supreme Court rejected his plea. Justice Larsen took part in that deliberation and cast a vote—a clear violation of the judicial canon that requires all judges to disqualify themselves from sitting in judgment on matters in which they are personally involved."

60. On Friday, May 13, 1983, the defendants, acting individually and in concert with one another, published, republished or caused to be published in the Inquirer an article entitled "The Larsen transcripts call for immediate action."

61. In the aforementioned article, "The Larsen transcripts call for immediate action", there appeared the following:

"The five judges on the board, marching in lockstep, joined by one lawyer member, voted to clear Justice Larsen of all charges. Although the records in past similar proceedings have been made public, the five judges, in lockstep voted to seal the record forever. The Supreme Court then rejected a petition by a non-judge member of the inquiry board to assume jurisdiction and thus perhaps to make the record public. Justice Larsen took part in those deliberations *and voted* with the 5-2 majority, his own interests, in clear violation of judicial rules of ethics."

62. On Sunday, May 29, 1983, the defendants, acting individually and in concert with one another, published, republished, or caused to be published an article in the Inquirer entitled "Chief Justice Roberts faces a defining challenge".

63. In the aforementioned article, "Chief Justice Roberts faces a defining challenge", there appeared the following:

> "Thus far in the Larsen matter, however, there are two strikes against him. He and a majority of his colleagues, in refusing a petition by a dissenting member of the inquiry board, allowed Justice Larsen, the subject of the investigation, to take part in the deliberations and to *vote—in his own behalf,* of course. That was a direct violation of the Code of Judicial Conduct." (Emphasis added).

64. On Wednesday, June 15, 1983, the defendants, acting individually and in concert with one another, published, republished, or caused to be published in the Post-Gazette an article entitled, "The best opportunity for judicial reform in Pennsylvania".

65. In the aforementioned article, "The best opportunity for judicial reform in Pennsylvania", there appeared the following:

> "Thus far in the Larsen matter, however, there are two strikes against him. He and a majority of his colleagues, in refusing a petition by a dissenting member of the inquiry board, allowed Justice Larsen, the subject of the investigation, to take part in the deliberations and to *vote—in his own behalf,* of course. That was a direct violation of the Code of Judicial Conduct." (Emphasis added).

66. On Saturday, June 18, 1983, the defendants, acting individually and in concert with one another, published, republished, or caused to be published in the Post-Gazette an article entitled "Probe lawyer advises open Larsen report".

67. In the aforementioned article, "Probe lawyer advises open Larsen report", there appeared the following:

> "Surrick, a persistent critic of the board's operations, was also the catalyst for one of the board's decisions at its regular meeting Thursday. The Delaware County lawyer, several weeks ago, had attempted to file a petition with the state Supreme Court, asking it to take jurisdiction over *the Larsen case.* The Court, with Larsen participating, refused to accept that petition." (Emphasis added).

68. Since the publication of the Sunday, May 8, 1983 article in the Inquirer alleging that plaintiff violated the Code of Judicial Conduct by voting on a matter in which he allegedly had a personal interest, there have been numerous other publications in the Inquirer, Post-Gazette and newspapers around the Commonwealth of Pennsylvania which republish the same allegation.

69. On Friday, May 13, 1983 The Pennsylvania Bar Association and Frank B. Boyle, Esquire, filed with the Supreme Court of Pennsylvania a "Petition to Assume Jurisdiction over Proceedings Relating to Charges of Judicial Misconduct" on the part of plaintiff. Plaintiff recused himself from considering this Petition and did not participate in the May 27, 1983 decision of the Supreme Court that denied the aforementioned Petition.

70. Plaintiff recused himself and did not participate in the May 27, 1983 decision of the Supreme Court that denied the aforementioned "Petition for Writ of Mandamus" referred to in paragraph 48 which sought an Order directing JIRB to file as a public record with the Supreme Court of Pennsylvania the record of the formal proceedings concerning plaintiff.

71. The language quoted in paragraphs 59, 61, 63, 65, and 67 from the aforementioned articles which states or implies that plaintiff acted in violation of the Code of Judicial Conduct is false in the following respects:

(a) the matter which was being considered by the Supreme Court was not "Larsen's case", but rather was styled and referred to as "APPLICATION OF ROBERT B. SURRICK, a member of the Judicial Inquiry and Review Board, In Re: PROCEEDINGS OF THE JUDICIAL INQUIRY REVIEW BOARD concerning 'XYZ', a certain member of the Judiciary" and no member of the judiciary was identified;

(b) the matter which was being considered by the Supreme Court was not a petition for the Supreme Court to take jurisdiction over a matter, nor was it a Removal Petition, but rather was an "APPLICATION FOR LEAVE TO FILE PETITION";

(c) plaintiff did not deliberate or vote on a matter which involved himself; and

(d) plaintiff did not violate a Canon of the Code of Judicial Conduct by voting.

72. One purpose of the aforementioned May 13, 1983 request for an Order of Mandamus was to legally justify the defendants having in their possession that which

they already had obtained by surreptitious and illegal means, i.e. the purported confidential transcripts.

73. Without waiting for a ruling from the Supreme Court of Pennsylvania on the aforementioned "Petition for a Writ of Mandamus", the defendants proceeded to publish, republish, or cause to be published excerpts purposefully selected by defendants from the purported confidential record of the proceedings of the Judicial Inquiry and Review Board relative to the matter of inquiry concerning plaintiff.

74. Defendants, and each of them, knew of the constitutionally, statutorily and procedurally mandated confidentiality of the transcripts at the time when they were received and published or republished.

75. The defendants selected and caused to be published and republished excerpts taken out of context from the purported confidential transcripts, excerpts which were calculated to damage plaintiff.

76. An additional purpose or object of defendants' acts was to misinform the public and thus create a public outcry against plaintiff.

77. On Sunday, May 8, 1983, defendants published, republished, or caused to be published in the Inquirer an article entitled "THE LARSEN TRANSCRIPTS". The aforementioned article which the defendants published included excerpts selected by defendants of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter of inquiry concerning plaintiff.

78. On Monday, May 9, 1983, defendants published, republished, or caused to be published in the Inquirer an article entitled "THE LARSEN TRANSCRIPTS". The aforementioned article which the defendants published

included excerpts selected by defendants of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter of inquiry concerning plaintiff.

79. On Tuesday, May 10, 1983, defendants published, republished, or caused to be published in the Inquirer an article entitled "THE LARSEN TRANSCRIPTS". The aforementioned article which the defendants published included purposely selected excerpts of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter of inquiry concerning plaintiff.

80. On Wednesday, May 11, 1983, defendants published, republished, or caused to be published in the Inquirer an article entitled "THE LARSEN TRANSCRIPTS". The aforementioned article which the defendants published included purposely selected excerpts of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter of inquiry concerning plaintiff.

81. On Thursday, May 12, 1983, defendants published, republished, or caused to be published in the Inquirer an article entitled "THE LARSEN TRANSCRIPTS". The aforementioned article which the defendants published included purposely selected excerpts of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter of inquiry concerning plaintiff.

82. On Saturday, May 14, 1983, defendants published, republished, or caused to be published in the Post-Gazette an article entitled "THE LARSEN TRANSCRIPT EXCERPTS: White-black issues are raised regarding Nix . . . as Larsen distinguishes between morals, law". The aforementioned article which the

defendants published, republished, or caused to be published included purposely selected excerpts of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter in inquiry concerning plaintiff.

83. On Saturday, June 11, 1983, the defendants published, republished, or caused to be published in the Post-Gazette an article entitled "The case against Larsen". The aforementioned article which the defendants published, republished, or caused to be published included purposely selected excerpts of purported confidential testimony given by witnesses before the Judicial Inquiry and Review Board in the matter of inquiry concerning plaintiff.

84. While the defendants had in their possession and control portions of the purported confidential transcripts which included testimony which exonerated and exculpated plaintiff, defendants willfully, wantonly, recklessly and intentionally did not publish such testimony which was favorable to plaintiff and thereby defendants placed plaintiff in an unfavorable and false light before the public.

85. Where favorable portions of such purported confidential testimony were published by defendants, they were used in such a manner as to create the impression that the weight of the testimony was against plaintiff and the defense was a simple denial on the part of plaintiff.

86. By willfully, wantonly, recklessly and intentionally printing the aforesaid selected excerpts of the purported confidential proceedings, the defendants have falsely attributed to plaintiff views that he does not hold and actions which he did not perform, thereby maliciously placing plaintiff before the public in a false light.

87. If the defendants had acted responsibly they would not have printed any of the purported confidential transcript and record, but if they were to publish and republish excerpts fairly, objectively, and accurately, then the portions of the purported confidential transcript and record which were selected would have included credible testimony presented by unbiased, competent, highly respected individuals and public officials which supported the Board's decision that the testimony, when taken as a whole, exonerated plaintiff.

88. An adjudicator, whether JIRB, court, agency, arbitrator, or the like, must render its decision objectively and impartially after consideration and evaluation of all evidence presented by all parties; by publishing only the selected excerpts from the purported confidential transcripts defendants have distorted the judicial process and adjudication.

89. The defendants, individually and in concert with one another, actively participated in a successful effort to procure a copy of the purported confidential transcript and sought out their source in order to procure a copy of the purported confidential transcript; thereafter, defendants repeatedly published, republished or caused to be published purportedly confidential matters which were not of public record.

90. At the time of the publication of the articles mentioned herein defendants knew that the inquiry by the Judicial Inquiry and Review Board was continuing and knew that, as a participant, plaintiff was bound by the constitutional, statutorial and procedural mandate of confidentiality and, therefore, could not comment and defend himself against libelous publications and republications made out of Court by defendants.

91. The confidentiality of the proceedings before the Judicial Inquiry and Review Board denied plaintiff the ability, which public officials are assumed by the public to have, to defend himself against libelous attacks by the media and, specifically, by these defendants.

92. At all times relevant hereto the defendants, and each of them, have acted individually and in concert with one another.

93. The acts of defendants have been a continual and continuing course of conduct engaged in by defendants against plaintiff.

94. The publication and republication of the aforementioned articles was and is part of a malicious course of conduct directed at plaintiff.

95. Defendants' publications and republications have caused and proximately caused severe injury to plaintiff in the following respects:

(a) they have invaded his interest in privacy, subjected him to humiliation, emotional distress and mental anguish;

(b) they have tarnished plaintiff's personal and professional reputation and tended to destroy his enormous popularity with the public; and

(c) they have exposed plaintiff to ridicule and contempt.

96. The continuous course of conduct on the part of the defendants since December, 1980 has been defamatory and has been carried out with malice and in reckless disregard for the truth of the matters published and republished and for the consequences of the defamatory conduct and libels.

97. Since the publication of the aforementioned articles, the defendants have published, republished, or caused to be published a 68 page volume entitled "ABOVE THE LAW: The questionable conduct of the Pennsylvania Supreme Court" which purports to be a republication of a series of articles which includes some of the articles mentioned herein.

98. The aforementioned 68 page volume continues to be published and circulated by defendants to the present time.

99. In part, the 68 page volume and the articles on which it was predicated was initiated, created, prepared, and circulated for the purpose of serving defendants' personal desire to receive personal awards and their consequent financial rewards; namely, defendants have submitted the 68 page publication to the Pulitzer Prize Committee requesting their award and prize money.

100. In addition, defendants continue to print new articles which republish past defamatory statements and show every prospect of continuing to publish and republish the defamatory statements in the future.

101. The defendants are all engaged in profit making enterprises and, as of 1982, the combined net worth of defendants was in excess of one billion ($1,000,000,000.00) dollars.

102. Each such publication and republication causes immediate, substantial, and irreparable harm to the personal and professional reputation of plaintiff and invades his right of privacy.

103. Plaintiff does not have a complete and adequate remedy at law inasmuch as plaintiff, an individual, would be placed in a position of having to constantly monitor defendants' publications and initiate litigation to recover

for each such injury inflicted; while plaintiff may have a remedy at law, such a remedy is not complete, nor is it adequate.

WHEREFORE, plaintiff Rolf Larsen requests the following relief at the conclusion of this case upon prevailing on any of Counts II through VII presented in his Complaint: (1) a permanent injunction against the defendants to prevent the further publication and republication of the defamations set forth in paragraphs 1 through 103 of this Complaint by the defendants; (2) judgment against the defendants, jointly and severally, for special and general damages in excess of $20,000.00, exclusive of interest and costs; (3) judgment against the defendants, jointly and severally, for punitive damages in an amount in excess of $20,000.00, exclusive of interest and costs, to deter defendants and others similarly situated from future lawless actions; (4) costs of suit and interest; and (5) such other relief as he may justly be entitled.

COUNT II

(DEFAMATION : ACCUSATION OF PERJURY)

Rolf Larsen

v.

PG Publishing Co., Fritz Huysman,
Eileen Foley, John G. Craig, Jr.,
William Block, Paul Block, Jr.

104. Plaintiff incorporates by reference paragraphs 1, 4, 5, 9, 10, 11, 18, 19, 20, 21, 22, 23, 24, 25, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43, 90, 91, 92, 93, 94, 95, 100, 101, and 102 of this Complaint as though fully set forth herein at length.

105. Because the defendants acted individually and in concert with one another to publish and republish the false and defamatory statements complained of herein, the defendants are jointly and severally liable to plaintiff for such special and general damages as will compensate him for the injury to his professional and personal reputation and for the emotional distress, anguish, and humiliation which the defendants have inflicted; in addition, plaintiff seeks punitive damages in such an amount as will punish the defendants for their malicious libels and will deter them, and others, from repetition of similar libels regarding plaintiff in the future.

WHEREFORE, Plaintiff Rolf Larsen demands judgment against the defendants, jointly and severally, for special and general damages in excess of $20,000.00, exclusive of interest and costs, and punitive damages in excess of $20,000.00, exclusive of interest and cost, and such other relief as he may justly be entitled.

COUNT III

(DEFAMATION REGARDING XYZ PETITION)

Rolf Larsen

v.

Philadelphia Newspapers, Inc.,
Knight-Ridder Newspapers, Inc.,
PG Publishing Co., William Block,
Paul Block, Jr., Daniel R. Biddle,
Edwin Gutham, Sam S. McKeel, Fritz Huysman,
Eileen Foley, John G. Craig, Jr.,
Robert Surrick

106. Plaintiff incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 38, 39, 40, 41, 42, 43, 44, 45, 58, 59, 60, 61, 62, 63,

64, 65, 66, 67, 68, 69, 70, 71, 76, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, and 102 of this Complaint as though fully set forth herein at length.

107. At the time of the publication of the articles on May 8, 13, and 29, 1983, June 15, and 18, 1983, and thereafter, defendants knew that the allegations contained therein were entirely false, or if they did not know, their failure to determine the accuracy of the articles was in utter and reckless disregard of its truth or falsity. The publication of these articles was a defamatory publication, actionable per se, and was published with malice.

108. Because the defendants acted individually and in concert with one another to publish, republish, or cause to be published the false and defamatory statements complained of herein, the defendants, and each of them, are jointly and severally liable to plaintiff for such special and general damages as will compensate him for the injury to his professional and personal reputation and for the emotional distress, anguish, and humiliation which they have inflicted; in addition, plaintiff seeks punitive damages in such amount as will punish the defendants for their malicious libels and will deter them and others from repetition of similar libels regarding plaintiff in the future.

WHEREFORE, Plaintiff Rolf Larsen demands judgment against all defendants, jointly and severally, for special and general damages in an amount in excess of $20,000.00, exclusive of interest and costs, and punitive damages in excess of $20,000.00, exclusive of interest and costs, and such other relief as he may be justly entitled.

COUNT IV

(INTRUSION ON THE RIGHT OF PRIVACY)
Restatement, Second, Torts §652B
42 Pa. C.S.A. §3334

Rolf Larsen

v.

Philadelphia Newspapers, Inc.,
Knight-Ridder Newspapers, Inc.,
PG Publishing Co., William Block,
Paul Block, Jr., Daniel R. Biddle,
Edwin Guthman, Sam S. McKeel, Fritz Huysman,
Eileen Foley, John G. Craig, Jr.,
Robert Surrick

109. Plaintiff incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 89, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, and 102 this Complaint as if fully set forth herein at length.

110. In procuring and causing the purported confidential transcript to be published and republished, the defendants acted in violation of: (1) Article V, Section 18(h) of the Constitution; (2) 42 Pa.C.S.A. §3334; (3) Rule 20 of the Rules of Procedure Governing the Judicial Inquiry and Review Board; and (4) the Restatement, Second, Torts §652B.

111. The defendants' procurement, publication, and republication of the purported confidential transcript was done with the intent to be an interference with plaintiff's interest in privacy.

112. The defendants' procurement, publication, and republication of the purported confidential transcripts was a substantial interference with plaintiff's rights and amounts to highly offensive and strongly objectionable behavior.

113. As a result of the individual and concerted acts of defendants, the defendants have caused and proximately caused injuries to the personal and professional reputation interests of plaintiff, interests which are protected by the laws of the Commonwealth of Pennsylvania.

114. At the time defendants procured, published, and republished the confidential transcript, the defendants knew that the privacy interests of plaintiff were protected by the laws of the Commonwealth of Pennsylvania, or if they did not know, their failure to determine the rights of plaintiff was willful, wanton, reckless, and done with malice.

115. Because the defendants acted individually and in concert with one another to illegally procure, publish, republish or cause to be published the purported confidential transcript, the defendants are jointly and severally liable to plaintiff for such special and general damages as will compensate him for the injuries to his right of privacy and for the emotional distress, anguish, and humiliation, which they have inflicted; in addition, plaintiff seeks punitive damages in such an amount as will punish the defendants for their malicious conduct and will deter them and others from repetition of similar conduct in the future.

WHEREFORE, Plaintiff Rolf Larsen demands judgment against the defendants, jointly and severally, for compensatory damages in excess of $20,000.00, exclusive of interest and costs, and punitive damages in excess of $20,000.00 exclusive of interest and costs, and such other relief as he may justly be entitled.

COUNT V

(INVASION OF RIGHT OF PRIVACY: FALSE LIGHT)
Restatement, Second, Torts §652E

Rolf Larsen

v.

Philadelphia Newspapers, Inc., Knight-Ridder Newspapers, Inc., PG Publishing Co., William Block, Paul Block, Jr., Daniel R. Biddle, Edwin Guthman, Sam S. McKeel, Fritz Huysman, Eileen Foley, John G. Craig, Jr., Robert Surrick

116. Plaintiff incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, and 102 of this Complaint as though fully set forth herein at length.

117. By publishing and republishing less than the whole truth, publishing and republishing purposely selected purported confidential excerpts and publishing and republishing false statements, defendants have falsely attributed to plaintiff views that he does not hold

and actions which he did not perform, thereby maliciously placing plaintiff before the public in a false light.

118. The willful, wanton, reckless and intentional publication of false statements and the failure on the part of the defendants to publish the whole truth is a serious, highly offensive, illegal and unreasonable invasion of plaintiff's interests. The defendants knew at the time they published and republished the selected purported confidential excerpts that they were not placing plaintiff before the public in a true light, or if they did not know it, their failure to determine the fairness and accuracy of their publications, particularly when the entire purported confidential record was in their possession and control, was in utter and reckless disregard of its truth or falsity and was, therefore, published with malice.

119. The defendants' actions have caused irreparable harm to the personal and professional reputation of plaintiff, invaded his right of privacy, caused emotional distress, mental anguish and humiliation. Because of defendants' malicious publication and republication of false statements and only the purposely selected excerpts of the testimony, plaintiff Rolf Larsen is entitled to recover from defendants, jointly and severally, special and general damages in such amount as will compensate him for the invasion of his privacy, injury to his personal and professional reputation, the emotional distress, the mental anguish, the humiliation, and punitive damages which will punish defendants for the malicious publications and will deter them and others from similar conduct in the future.

WHEREFORE, Plaintiff Rolf Larsen demands judgment against all defendants, jointly and severally, for special and general damages in excess of $20,000.00, exclusive of interest and costs; punitive damages in excess of $20,000.00, exclusive of interest and costs; and such other relief as he may justly be entitled.

COUNT VI

(Article I §1 and Article V §18(h) of
the Constitution)
42 Pa. C.S.A. §3334

Rolf Larsen

v.

Philadelphia Newspapers, Inc.,
Knight-Ridder Newspapers, Inc.,
PG Publishing Co., William Block, Paul Block, Jr.,
Daniel R. Biddle, Edwin Guthman, Sam S. McKeel,
Fritz Huysman, Eileen Foley,
John G. Craig, Jr., Robert Surrick

120. Plaintiff incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, and 102 of this Complaint as though fully set forth herein at length.

121. The publication of the aforementioned confidential transcripts is a violation of: (1) Article I, Section 1 and Article V, Section 18(n) of the Constitution of the Commonwealth of Pennsylvania; (2) 42 Pa. C.S.A. §3334; and the Order of Court establishing Rule 20 of the Rules of Procedure Governing the Judicial Inquiry and Review Board.

122. The defendants, acting individually and in concert with one another, failed to respect the inherent right of plaintiff to reputation protected by Article I, Section 1 and Article V, Section 18(h) of the Constitution of the Commonwealth of Pennsylvania as well as the statutory rights protected by 42 Pa. C.S.A. §3334 and 42 Pa. C.S.A. §8341 *et seq.* by publishing the aforementioned confidential transcripts and have acted with recklessness, gross negligence, malice and intent to injure plaintiff.

123. As a result of the individual and concerted acts of defendants, the defendants have caused and proximately caused injury to the personal and professional reputation interests of plaintiff, interests protected by the laws of the Commonwealth of Pennsylvania.

124. At the time the defendants published or caused to be published excerpts from the purported confidential transcripts the defendants knew that the reputation interests of plaintiff were protected by the laws of the Commonwealth of Pennsylvania, or if they did not know, their failure to determine the rights of plaintiff was willful, wanton, reckless and done with malice.

125. Because the defendants acted individually and in concert with one another to publish the purported confidential transcripts, the defendants are jointly and severally liable to plaintiff for such special and general damages as will compensate him for the injury to his professional and personal reputation, emotional distress, mental anguish, and humiliation which they have inflicted; in addition, plaintiff seeks punitive damages in an amount as will punish the defendants for their malicious conduct and will deter them and others from repetition of similar conduct in the future.

WHEREFORE, Plaintiff Rolf Larsen demands judgment against the defendants, jointly and severally, for special damages in excess of $20,000.00 exclusive of interest and costs; for general damages in an amount in excess of $20,000.00, exclusive of interest and costs; and for punitive damages in an amount in excess of $20,000.00, exclusive of interest and costs; and such other relief as he may justly be entitled.

COUNT VII

(42 Pa. C.S.A. §4135)

Rolf Larsen

v.

Philadelphia Newspapers, Inc.,
Knight-Ridder Newspapers, Inc.,
PG Publishing Co., William Block, Paul Block, Jr.,
Daniel R. Biddle, Edwin Guthman, Sam S. McKeel
Fritz Huysman, Eileen Foley,
John G. Craig, Jr., Robert Surrick

126. Plaintiff incorporates by reference paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 62, 64, 66, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, and 102 of this Complaint as though fully set forth herein at length.

127. Defendants' actions were in violation of 42 Pa. C.S.A. §4135:

> §4135. Publication out of court
>
> (a) General rule.—Publication out of court respecting the conduct of judges, district justices, other system or related personnel, jurors or

participants in connection with any matter pending before any tribunal shall not be construed as a contempt of court on the part of the author, publisher or other person connected with such publication.

(b) Civil and criminarly liability not affected.—If any publication specified in subsection (a) shall improperly tend to bias the minds of the public, or of the tribunal, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal, any person aggrieved thereby may proceed against the persons responsible for the publication by appropriate civil action or criminal proceeding.

128. The aforementioned publication and republication by defendants has caused extreme and irreparable harm to plaintiff's interest in (1) having the matters resolved by individuals who have not been exposed to such publications and republications of defendants; (2) having justice administered without any question of bias or suggestion of bias; (3) having justice administered by individuals who are not predisposed; and (4) having the resolution of the matter presented to a public and electorate which has not been exposed to defendants' publications.

129. Because the defendants acted individually and in concert with one another to publish and republish the aforementioned articles, the defendants, and each of them, are jointly and severally liable to plaintiff for such an amount as will compensate him for the injury to his protected interests and for the emotional distress, mental anquish, and humiliation which they have purposely inflicted; in addition, plaintiff seeks damages in an amount as will punish the defendants for their extreme

and outrageous conduct in attempting to influence pending judicial matters and will deter them and others from repetition of similar conduct in the future.

WHEREFORE, Plaintiff Rolf Larsen demands judgment against the defendants, jointly and severally, for compensatory damages in excess of $20,000.00 exclusive of interest and costs, punitive damages in excess of $20,000.00 exclusive of interest and costs, and such other relief as he may justly be entitled.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.
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Attorneys for Plaintiff

JURY TRIAL IS REQUESTED

AFFIDAVIT

State of Florida
County of Broward } SS:

Before me, the undersigned authority, personally appeared Rolf Larsen who, after being duly sworn according to law, deposes and says that the facts set forth in the aforegoing Amended Complaint in Equity are true and correct to the best of his knowledge, information and belief.

ROLF LARSEN
Rolf Larsen

SWORN to and subscribed before me this 14 day of December, 1983.

WILLIAM M. DAILEY
Notary Public, State of Florida
My Commission Expires Feb. 26, 1985
Bonded by Mincey Agency—462-3641

NOTICE TO PLEAD

You are hereby required to respond to the within Amended Complaint in Equity within thirty (30) days of service thereof upon you or a default judgment may be entered against you.

ROBERT W. HASTINGS
Robert W. Hastings

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Complaint in Equity was served upon counsel for the following defendants by hand delivering a copy to the following:

Frederick N. Egler, Esq. Egler, Anstandig, Garrett & Riley 21st Floor, Lawyers Building 428 Forbes Avenue Pittsburgh, PA 15219	Attorney for Defendant Robert Surrick, Esq.
Walter T. McGough, Esq. Reed, Smith, Shaw & McClay 747 Union Trust Building Pittsburgh, PA 15219	Attorney for Defendant P.G. Publishing Company, William Block, Paul Block, Jr., Fritz Huysman, Eileen Foley, and John G. Craig, Jr.

I hereby certify that a true and correct copy of the foregoing Amended Complaint in Equity was served upon counsel for the following defendant by U.S. Mail, first class, postage pre-paid, to the following:

Samuel E. Klein, Esq. Kohn, Savett, Marion & Graf 1214 IVB Building 1700 Market Street Philadelphia, PA 19103	Attorney for Defendant Knight-Ridder Newspapers, Inc., Daniel R. Biddle, Edwin Guthman and Sam McKeel

ROBERT W. HASTINGS
Robert W. Hastings
Attorney for Plaintiff,
Rolf Larsen

DATED: December 15, 1983

No. 88-1274

Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

ROLF LARSEN,

Petitioner,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., and ROBERT SURRICK,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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March 1, 1989

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1274

ROLF LARSEN,

Petitioner,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., and ROBERT SURRICK,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Respondents Philadelphia Newspapers, Inc., Knight-Ridder Newspapers, Inc., PG Publishing Co., William Block, Paul Block, Jr., Daniel R. Biddle, Edwin Guthman, Sam S. McKeel, Fritz Huysman, Eileen Foley, John G. Craig, Jr., and Robert Surrick hereby submit a Joint Brief in Opposition to the Petition for Writ of Certiorari filed by Rolf Larsen.

I. Counterstatement of the Case

On November 14, 1983, petitioner Rolf Larsen, a member of the Supreme Court of Pennsylvania, initiated this action against two Pennsylvania newspapers, various officers and employees of those newspapers, and a member of the Pennsylvania Judicial Inquiry and Review Board ("JIRB"). In material part, he sought injunctive relief and monetary damages from the defendants for allegedly disseminating and publishing excerpts of proceedings before the JIRB, which had conducted an investigation of Justice Larsen for alleged improprieties.

As ultimately amended, Justice Larsen's Complaint included two counts relevant to his present petition, Count IV and Count VI, each alleging an invasion of a right to privacy supposedly afforded him by common law and by certain portions of Pennsylvania's Constitution, statutes, and rules specifying that some stages of JIRB proceedings should be confidential. *See* 105a-111a.*

Respondents ultimately demurred to portions of the Amended Complaint, including Counts IV and VI. On May 16, 1984, the Court of Common Pleas of Allegheny County issued an order that, *inter alia*, sustained respondents' demurrer to Counts IV and VI, but granted leave to amend Count IV. *See* 73a. Shortly thereafter it certified this portion of its Order for interlocutory appeal pursuant to 42 Pa. C.S. §702(b) and Pa.R.App.P. 312. 75a. Those portions of the action not covered by this certification remain pending in the Court of Common Pleas.

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* Page references are to the Appendices to Justice Larsen's Petition for Writ of Certiorari.

On June 2, 1988, the Pennsylvania Superior Court issued its Order and Opinion in this interlocutory appeal and affirmed the lower court's holding regarding Count IV and VI. Relying in part upon this Court's decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) and in part upon its own reading of the relevant provisions of state law, the court concluded that neither Pennsylvania's Constitution, its statutes, nor its rules created the causes of action pressed by Justice Larsen in those counts. Like the lower court, however, it granted Justice Larsen permission to amend his claim for invasion of privacy (Count IV) to reflect more clearly the basis for his allegation that the information published about him had been obtained "illegally." *See* 8a-20a.

On October 31, 1988, the Supreme Court of Pennsylvania denied cross-petitions for allowance of appeal. 1a-2a.

II. REASONS WHY CERTIORARI SHOULD BE DENIED

This Court should deny certiorari for any one of three reasons: (1) the decision below is not a final judgment and therefore is beyond this Court's jurisdiction; (2) the decision below was supported by adequate and independent state grounds, and (3) the decision below was based upon Justice Larsen's failure to plead his case with sufficient particularity.

A. The decision below is not a final judgment.

Justice Larsen would invoke the jurisdiction of this Court under 28 U.S.C. §1257(c), which allows review only of "[f]inal judgments or decrees . . . ." Here, the judgment is far from final.

The trial court sustained respondents' demurrer to some, but not all, of the counts in the Amended Complaint. As to one of the two counts cited in Justice Larsen's present petition, Count IV, he was granted leave to amend. Prior to any such amendment, the Pennsylvania Superior Court accepted an interlocutory appeal under a provision authorizing immediate review where such review might materially advance the ultimate termination of the litigation. *See* 42 Pa. C.S. §702(b); Pa.R.App.P. 312. Eventually, the Superior Court affirmed the trial court in all relevant respects and remanded the matter for further proceedings. The Supreme Court of Pennsylvania then denied review.

This Court has never considered orders sustaining demurrers but granting leave to amend sufficiently final to vest it with jurisdiction. *See Missouri Kansas R. Co. v. Olathe,* 222 U.S. 185 (1911). *See also Clark v. Kansas City,* 172 U.S. 334, 336-39 (1899); *McComb v. Commissioners,* 91 U.S. 1 (1876). Nor does this case fit

into any of the four categories of non-final state court judgments that occasionally merit this Court's immediate attention. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975).

Despite the passage of more than five years from the filing of this action, Justice Larsen has failed to move it beyond the most preliminary stages of pleading. This Court simply lacks jurisdiction to entertain his request for further interlocutory review.

B. The decision below is based upon an adequate and independent state ground.

Both the Court of Common Pleas and the Superior Court discussed at some length this Court's decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). At bottom, however, both courts decided an issue of state law: whether certain confidentiality provisions in Pennsylvania's Constitution, its statutes, and its rules granted Justice Larsen a private cause of action.

In approaching this issue, the Superior Court bifurcated its analysis. First, it examined *Landmark* and concluded that such a cause of action would, in this case, threaten important interests protected by the First Amendment. 10a-16a. The Superior Court then stated an alternative reason for its holding, a reason based entirely in state law:

> Additionally, we note that if the Legislature had intended to permit the recoupment of damages for violation of 42 Pa. C.S. §3334, it could have very easily expressed such an intention . . . .
>
> Consistent with the aforesaid is the decision of the Third Circuit Court of Appeals in *The First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (1986), wherein it was

> observed that nothing in Pennsylvania's Constitution bars the dissemination of information which the press *has received.*
>
> Thus, nothing in the text of the provisions relied upon by [Justice Larsen] or the case law reviewed suggests that this Court should create a civil remedy not otherwise expressly mentioned in the relevant provisions, and we have been presented with no persuasive argument to the contrary. Accordingly, [Justice Larsen's] request that we endorse a private cause of action ... will not be entertained on the authority proffered to us at this time.

16a-17a (emphasis in original).

Because the Superior Court made a straightforward interpretation of state law in this regard, an interpretation independent of its earlier discussion of *Landmark,* its decision should not be reviewed by this Court.

C. The issue presented here, turning as it does on Justice Larsen's failure to plead his case with sufficient particularity, does not merit this Court's review.

Justice Larsen asserts that this Court should grant certiorari here to decide an issue supposedly reserved in *Landmark,* namely whether the publication of confidential information obtained "illegally" by a newspaper can subject that newspaper to civil liability. *See* Petition, at 11-12. But even the Superior Court was confused by Justice Larsen's vague use of the term "illegal":

> ... [O]ur dilemma is that we are unable to ascertain the thrust of the appellant's 'illegality' argument, *i.e.,* we know not whether it relates to a purported violation of the Pennsylvania Constitution, statute

> and rule of confidentiality covering JIRB proceedings (which, this day, we have found to be wanting), or whether it encompasses the use of subterfuge in obtaining the information published which goes beyond the acceptable bounds of news gathering techniques and exposes news media defendants to liability for torts committed in pursuit of information.

19a. The Superior Court therefore affirmed respondents' demurrer to Count IV and ordered Justice Larsen, by amendment, "to elaborate on the 'illegality' assertion to hurdle the legitimate methods open to the press to obtain information . . . ." 19a-20a.

In Rule 17, this Court has suggested reasons why certiorari might be granted in any particular case. While making no reference to those criteria in his petition, Justice Larsen apparently would style his case as one where "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court . . . ." Rule 17.1.c. This is not such a case. The courts below have merely required that he set forth his claim with sufficient particularity so as to allow them to measure it against state, as well as federal, law. No further review is merited.

III. Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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March 1, 1989